TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, PETITIONER,

vs.

NATIONAL SURETY CORPORATION AND PATRICK J. MALONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 28, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,347

AT LAW.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION, APPELLANT,

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

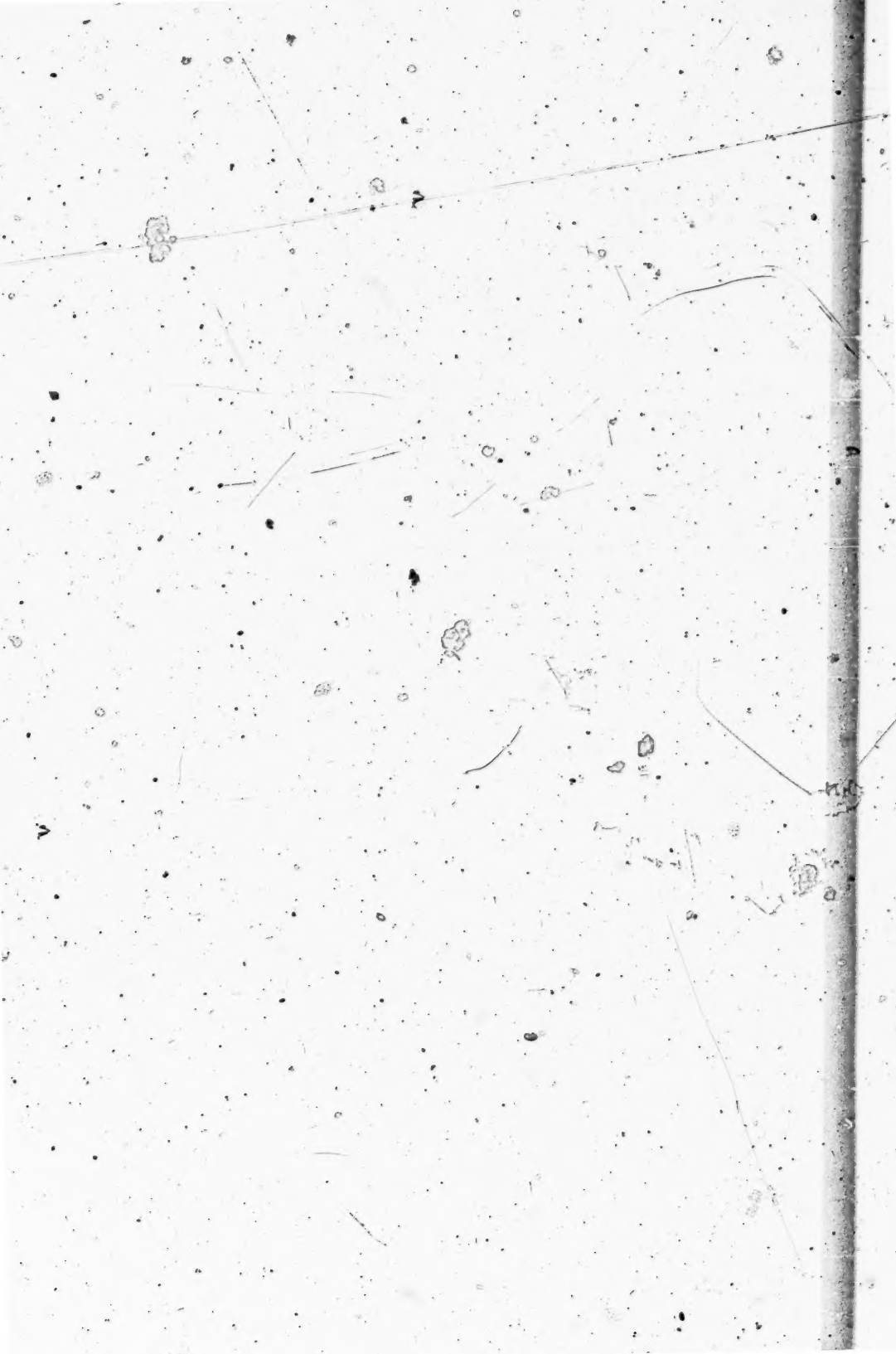
FILED OCTOBER 21, 1938

INDEX.

	Original	Print
Praecipe for Transcript and Election as to Printing record	1	1
Complaint	3	3
Excerpts from Postal Regulations	10	11
Exhibit A, Bond of Patrick J. Malone	18	19
Exhibit B, List of Contracts and Notes purchased by Plaintiff from Defendant	19	21

	Original	Print
Demurrer of Defendant National Surety Corporation to Complaint	22	25
Demurrer of Defendant Patrick J. Malone to Complaint	24	26
Order overruling Demurrers to Complaint	26	27
Answer of Defendant National Surety Corporation	29	30
Answer of Defendant Patrick J. Malone	32	32
Reply of Plaintiff to Answer of National Surety Corporation	34	34
Reply of Plaintiff to Answer of Patrick J. Malone	35	35
Order extending time to file Bill of Exceptions	36	35
Order further extending time to file Bill of Exceptions	37	36
Bill of Exceptions	39	36
Caption	39	36
Recital of overruling of Demurrers to Complaint	39	36
Recital of filing of Answers and Replies	40	37
Opening Statement to Jury on behalf of Plaintiff	41	38
Motion of Defendant, National Surety Corporation, for directed verdict and denial thereof	56	48
Motion of Defendant, Patrick J. Malone, for directed verdict and denial thereof	58	49
Motion of Defendants for leave to amend Answers and granting thereof	58	49
Motion of Plaintiff to strike portion of Answer of Defendant, National Surety Corporation	61	51
Recital as to Testimony of witnesses on behalf of Plaintiff	65	54
Motion of Defendant, National Surety Corporation for directed verdict	66	54
Motion of Defendant, Patrick J. Malone, for Directed Verdict	67	55
Recital of Court in overruling Motions for directed verdict	68	56
Recital as to testimony of witnesses on behalf of Defendants	68	56
Statements by Counsel	69	57
Renewal of Motion of Defendant, National Surety Corporation for directed verdict	75	61
Motion of Defendant, National Surety Corporation to dismiss	75	61
Renewal of Motion of Defendant, Patrick J. Malone for directed verdict	77	62
Recital of Court in overruling Motions for directed verdict and in reserving ruling on Motion to dismiss	78	63
Recital as to Court's Charge to Jury	78	63
Recital as to Verdict and Judgment	78	63
Motion of Defendant, National Surety Corporation to dismiss Complaint	78	64
Motion of Defendant, Patrick J. Malone to dismiss Complaint	80	65
Recital as to Order granting Motion of Defendant, National Surety Corporation to dismiss	83	67
Recital as to Order dismissing action as to Patrick J. Malone	83	67
Judgment, June 14, 1938	83	67
Prayer of Plaintiff for approval of Bill of Exceptions	83	67
Stipulation of Counsel approving Bill of Exceptions	84	67
Approval of Bill of Exceptions by District Judge	85	68
Acknowledgment of Service of Bill of Exceptions by Counsel for Defendants	86	69
Order granting Motion of Defendant, National Surety Corporation to dismiss, May 16, 1938	88	70

	Original	Print
Order dismissing cause as to Defendant, Patrick J. Malone, June 11, 1938	114	88
Order of District Court vacating Judgment of October 29, 1937; Judgment in favor of Defendants	116	89
Judgment, June 14, 1938	116	89
Notice of Appeal and admission of Service	117	90
Order allowing Appeal, etc	118	91
Petition for Appeal and Assignment of Errors	119	92
Bond on Appeal	122	94
Citation and Admission of Service	124	97
Order extending time to file Transcript	126	98
Clerk's Certificate to Transcript	127	98
Proceedings in U. S. Circuit Court of Appeals	100	100
Appearance of Counsel for Appellant	100	100
Appearance of Mr. M. J. Doherty, Mr. Pierce Butler, Jr., and Mr. R. O. Sullivan as Counsel for Appellees	100	100
Appearance of Mr. George T. Havel as Counsel for Appellees	101	100
Order of Submission	101	101
Opinion, U. S. Circuit Court of Appeals	102	101
Judgment, U. S. Circuit Court of Appeals	108	107
Petition of Appellant for a Rehearing	109	109
Order Denying Petition for Rehearing	115	115
Clerk's Certificate to Transcript	116	115
Order allowing certiorari		116



Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the March Term, 1939, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Arba S. Van Valkenburgh, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the twenty-first day of October, A. D. 1938, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, was Appellant, and the National Surety Corporation, a corporation, and Patrick J. Malone, were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Praecipe for Transcript and Election as to Printing.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

vs.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

The Clerk of the above Court will prepare and forward to the United States Circuit Court of Appeals for the Eighth Circuit, a transcript of the record on appeal in the above case, consisting of the following records:

1. Bill of Complaint

2. Demurrer of defendant National Surety Corporation

3. Demurrer of defendant Patrick J. Malone

4. Order by Honorable Matthew M. Joyce overruling demurrer dated July 3, 1937, and memorandum attached thereto

5. Answer of defendant National Surety Corporation

6. Answer of defendant Patrick J. Malone

7. Reply to answer of defendant National Surety Corporation

8. Reply to answer of defendant Patrick J. Malone

9. Bill of Exceptions before Honorable Gunnar H. Nordbye, filed September 19, 1938

10. Order of Honorable Gunnar H. Nordbye, dated May 16, 1938, granting defendant National Surety Corporation's motion to dismiss, and memorandum accompanying the same

11. Order of Honorable Gunnar H. Nordbye, dated June 11, 1938, granting defendant Patrick J. Malone's motion to dismiss, and memorandum accompanying the same

12. Judgment of Dismissal dated June 14, 1938

13. Notice of Appeal

14. Petition for Appeal, Assignment of Errors, and Prayer for Reversal

[fol. 2] 15. Order allowing appeal

16. Bond on appeal

17. Citation

18. Orders extending time to file Bill of Exceptions

19. Order extending Citation

20. Praecipe and Election as to Printing

Plaintiff gives notice of its election to have the printing of such transcript of the record done under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of said Court.

Dated this 19th day of September, 1938.

LEONARD, STREET, and
DEINARD,
Attorneys for plaintiff
1036 Andrus Building
Minneapolis, Minnesota.

Service of the within Praecipe for Transcript and Election as to Printing is hereby admitted this 21st day of September, 1938.

DOHERTY, RUMBLE, BUTLER, SULLIVAN & MITCHELL,
Attorneys for National Surety Corporation.

GEORGE T. HAVEL,
By RDF
Attorney for Patrick J. Malone.

Filed September 28, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 3] Complaint.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

vs.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

Comes now Midland Loan Finance Company, use-plaintiff above named, a corporation organized under the laws of the State of Minnesota, and a citizen and inhabitant thereof, having its principal place of business in the City of Minneapolis in the above District and Division, and for its complaint against defendants and each of them alleges:

I.

Midland Loan Finance Company, the use-plaintiff herein, hereinafter for brevity designated "plaintiff", at all times hereinafter alleged and at the time of the commencement of this action was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and a citizen and inhabitant of said State, having its office and principal place of business in the City of Minneapolis, in the above District and Division, and engaged in the finance business, and more particularly, in the purchase of negotiable paper evidencing

the purchase price of automobiles, and conditional sales contracts upon automobiles securing such paper.

II.

At all times herein mentioned, and at the time of the commencement of this action, defendant National Surety Corporation, was and now is a corporation duly organized and existing under and by virtue of the laws of the State [fol. 4] of New York, having its principal place of business in New York City, in said State, and a citizen and inhabitant of said State, and having its principal place of business for the State of Minnesota in said city of Minneapolis in the above District and Division, and duly qualified and licensed to do business in the State of Minnesota, and carrying on a bonding and insurance business for hire.

At all times hereinafter mentioned and at the time of the commencement of this action, defendant Patrick J. Malone was and now is a citizen and inhabitant of the State of Minnesota, residing at Montgomery, in the County of LeSueur, in said state.

III.

This court has jurisdiction of the above case because there is a diversity of citizenship between plaintiff and defendant National Surety Corporation, and the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000, and because this case arises under the Postal Laws of the United States.

IV.

Shortly prior to July 31, 1934 defendant Patrick J. Malone, (hereinafter for brevity designated "defendant Malone") was duly designated and appointed Acting Postmaster at the United States Post Office at Montgomery, in the County of LeSueur and State of Minnesota, effective July 31, 1934, by the Postmaster General of the United States in accordance with the Act of Congress approved March 1, 1921. Before entering upon the duties of his office, defendant Malone on July 31, 1934 duly executed the prescribed oath of office, and on August 1, 1934, as principal, with defendant National Surety Corporation as surety, duly signed, executed and delivered to the United

States of America, a Presidential Acting Postmaster's Bond, in the penal sum of $16,000, dated said day, conditioned among other things for the faithful discharge of all duties and trusts imposed on him as Acting Postmaster, either by law or by the regulations of the Post Office Department, and duly qualified as such Acting Postmaster. Thereupon on said August 1, 1934, defendant Malone duly [fol. 5] took possession and charge of said Post Office. Said oath and bond were duly transmitted to the First Assistant Postmaster General for examination, approval and filing, and on August 14, 1934 were duly approved and accepted for the Postmaster General of the United States by the First Assistant Postmaster General. Hereto attached marked "Exhibit A" and incorporated in this complaint by reference is a true and correct copy of said bond. From and after August 1, 1934 during the entire period mentioned in this complaint defendant Malone was in complete charge and control of said Post Office as Acting Postmaster thereof and responsible under said bond for the performance of his duties. Said Bond was made to the United States of America as the named obligee therein for the use, benefit and protection of all persons lawfully using the United States mails at, to, and from Montgomery, Minnesota, including plaintiff, as well as for the use, benefit and protection of the United States of America, and plaintiff, having an interest in said bond, which was designed to secure the faithful performance of the official duties of defendant Malone in the discharge of which plaintiff had and has a proper interest, and having been damaged by the failure of defendant Malone faithfully to discharge the duties and trusts imposed on him as such Acting Postmaster by law and by the regulations of the Post Office Department after the date he took charge of said Post Office, in connection with plaintiff's lawful use of the United States Mail at and to said Montgomery, Minnesota, hereby brings this action upon said bond and to recover the penalty thereof in the name of the United States of America for plaintiff's own use and benefit.

V.

At all times hereinafter mentioned, one Thomas Hunting was engaged in the automobile business, and more particu-

larly in the sale of automobiles and of negotiable paper and conditional sales contracts relating to automobiles, at Montgomery, Minnesota, under his own name and under the name of Tom Hunting Company.

[fol. 6] VI.

Some time prior to August 1, 1934, said Hunting solicited plaintiff to purchase conditional sales contracts held by him on and reserving title to automobiles sold and to be sold by him to his customers, including the promissory notes signed by the purchasers evidencing their obligation to pay the deferred instalments on said contracts, and plaintiff agreed to purchase such contracts and notes with respect to automobiles sold and to be sold by said Hunting in the usual, customary, and regular course of his business. Thereafter, said Hunting from time to time offered to sell to plaintiff automobile contracts, and notes, and on each occasion represented and warranted to plaintiff that said contracts represented and reserved title to automobiles owned by him, and by him sold in the usual, customary, and regular course of business to bona fide customers, who had taken and then had possession of such automobiles, and that said notes represented the bona fide and enforceable obligations of such purchasers to pay the deferred instalments of the purchase price of said automobiles as recorded in said contracts; that such purchasers resided in LaSueur County, Minnesota, in the trade territory adjoining and tributary to Montgomery, Minnesota; that said contracts and notes were in all respects valid and subsisting, and that the unpaid balances recited therein represented the true unpaid balances legally owing by and in fact collectible from such purchasers.

VII.

Plaintiff believed said representations and warranties to be true and did purchase from time to time commencing prior to August 1, 1934, from said Hunting automobile contracts and notes, and paid said Hunting therefor.

VIII.

Plaintiff's established and routine course of business in buying automobile contracts and notes from automobile

dealers, such as said Hunting, was as follows: Plaintiff required the dealer to furnish purchaser's statements signed by the automobile purchasers named in the automobile contracts and notes offered for sale, containing credit references so that plaintiff might ascertain the credit rec- [fol. 7] ord, financial responsibility and trustworthiness of the purchasers. Thereafter plaintiff mailed inquiries to the named credit references, requesting information as to the credit record, financial responsibility and trustworthiness of the purchasers. Upon purchasing such contracts and notes as it deemed satisfactory, plaintiff mailed notices to the automobile purchasers named in the contracts and notes stating therein that plaintiff had purchased and had become the owner of the contracts and notes and that all further payments thereon should be made directly to it, and enclosed therewith a memorandum book containing a schedule of the amounts and dates of payments as they would fall due according to the tenor of said contracts and notes.

Plaintiff did not rely solely on the representations of the dealers or their financial responsibility, but relied upon the procedure hereinbefore described to verify the warranties and representations made by the dealers as to the genuineness of sales of automobiles, the validity of the contracts and notes, and the identity, financial responsibility and trustworthiness of the automobile purchasers, and to acquire independent information about the same. Over a period of years plaintiff had determined that said procedure was necessary for its protection and adequate to insure its protection.

Therefore, in making said purchases from said Hunting, plaintiff followed said procedure according to its established and routine method of doing business, and reasonably relied thereon to investigate and verify the aforesaid representations and warranties made to it by said Hunting.

IX.

In all of the contracts and notes sold by said Hunting to plaintiff and involved in this suit, the residences of the purported automobile purchasers and credit references were given as being in said LeSueur County, in the trade

territory adjacent and tributary to Montgomery, Minnesota. All communications between plaintiff and such purported automobile purchasers and credit references were had through the United States mails, by means of letters and communications addressed by plaintiff to them at Montgomery, Minnesota, and deposited in the United States mail at Minneapolis, Minnesota, with postage pre-
[fol. 8] paid and bearing in the upper left-hand corner of each envelope containing such letters and communications plaintiff's name and return address, to-wit: No. 505 Wesley Temple Building, Minneapolis, Minnesota, and a request to return, together with a pledge to pay the return postage. Because of the distance from plaintiff's principal place of business to the postoffice addresses of said purported automobile purchasers and said credit references the foregoing practice of using the mails was necessary for the economical and efficient handling of plaintiff's business, and was reasonably adopted and relied on by plaintiff as a business practice for its protection.

X.

Some time prior to August 1, 1934, said Thomas Hunting conceived and thereafter executed a scheme of defrauding plaintiff by means of the following wrongful and unlawful acts, misrepresentations, frauds, conspiracies, confederations, agreements and violations of law:

(a) By making out false, forged and fictitious conditional sales contracts and notes falsely purporting to represent actual sales and deliveries of automobiles by said Hunting in the usual, customary and regular course of his business to actual purchasers resident in LeSueur County in the trade territory adjoining and tributory to Montgomery, Minnesota, who had taken and had possession of such purported automobiles, and by offering the same for sale to plaintiff as genuine, valid, and subsisting instruments and obligations;

(b) By falsely representing and warranting to plaintiff that such purported contracts and notes were genuine and represented actual sales and deliveries of automobiles to actual bona fide purchasers as aforesaid, whereas the

same were on the contrary false and fictitious, reciting fictitious sales of fictitious automobiles to fictitious persons;

(c) By falsely inducing plaintiff to believe that said representations and warranties were true, and by causing plaintiff to purchase such fictitious contracts and notes from time to time;

[fol. 9] (d) By making out and delivering to plaintiff in connection with such false and fictitious contracts and notes, wholly invented and fictitious purchasers' statements containing fictitious names for credit references and bearing fictitious signatures forged by him;

(e) By unlawfully intercepting at the Montgomery, Minnesota, Post Office all [cummunications] and letters which plaintiff in its aforesaid course of business mailed through the United States mails addressed to said purported purchasers named in the false and fictitious contracts and notes, and to the said purported credit references named in the purported purchasers' statements;

(f) After intercepting said mail, by sending to plaintiff wholly fictitious, forged, false and fraudulent responses to plaintiff's inquiries addressed by it to the purported credit references, in the names of the purported credit references;

(g) By conspiring and confederating with defendant Malone and his assistants and subordinates in the said Post Office at Montgomery, Minnesota, acting under his supervision and control, to intercept at said Post Office all mail communications and letters addressed and mailed by plaintiff to said purported purchasers, and said purported credit references, immediately upon the arrival of said mail at said Post Office;

(h) By unlawfully and corruptly arranging and agreeing with defendant Malone and his said assistants and subordinates that all mail communications and letters bearing upon the envelopes the return name and address of plaintiff be delivered to said Hunting directly, notwithstanding that such mail communications and letters were addressed to others than said Hunting;

(i) By unlawfully procuring defendant Malone and his said assistants and subordinates to deliver to said Hunting directly upon their arrival at said Post Office all mail, communications and letters addressed by plaintiff in the names of the fictitious purchasers and fictitious credit references;

(j) By selling such false and fictitious contracts and notes to plaintiff, and by continuing the execution of said scheme, and by continuing to sell further false and fictitious [fol. 10] contracts and notes to plaintiff in the fraudulent manner aforesaid;

(k) And by continuing with the aid, participation and connivance of defendant Malone and his said assistants and subordinates to intercept all of said mail communications and letters at said post office, whereby plaintiff was wholly prevented and disabled from investigating and/or discovering the falsity of the aforesaid representations and warranties made to it by said Hunting, and from discovering the false, fraudulent, fictitious and worthless character of said contracts and notes, and the fraud perpetrated upon it by said Hunting;

(l) By forwarding instalment payments to plaintiff in the names of said purported purchasers according to the tenor of said purported contracts and notes, out of moneys received by said Hunting from plaintiff as the purchase price of further fictitious contracts and notes sold by him to plaintiff.

XI.

Defendant Malone as Acting Postmaster of said Post Office, and his said assistants and subordinates, were charged with the duty faithfully to discharge and perform all duties and trusts imposed upon them by law, and by the regulations of the Post Office Department relating to delivery and return of mail, and, in addition, defendant Malone, as Acting Postmaster of said Post Office, was and is individually charged with responsibility and liability for any breach of said duties or trusts by any of his said assistants or subordinates.

At all times herein mentioned, the following Postal Regulations were prescribed for the government of the Post

Office Department, the conduct of its postmasters and clerks, the performance of the business of the Postal Service, and the custody and delivery of the mail, and were promulgated by Order No. 2834 on August 26, 1932 by the Postmaster General of the United States in accordance with the Act of Congress approved February 23, 1931, and were in force and effect:

Section 445, paragraph 1:

"Postmasters shall give their personal attention to the business of their offices, and shall not absent themselves [fol. 11] therefrom for a longer period than two days without written authority from the inspector in charge of the division in which the office is located. Absence for two days or less shall be reported promptly to the inspector in charge."

Section 702, paragraph 1:

"Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to postoffice inspectors, and may furnish it also to the sender, the addressee, or the authorized representative of either when satisfactory identification has been established and the request is limited to information proper for the applicant to receive, and they may give to officers of the law upon proper identification to aid in the apprehension of fugitives from justice information regarding the addresses, return cards, or postmarks on mail matter, but shall not withhold such mail from delivery to the addressees."

Section 703, paragraph 1:

"Postmasters shall not permit to have access to any mail matter in the post office any persons except duly sworn assistants, clerks, letter carriers, post-office inspectors, and those mail contractors and carriers who, under the terms of the contract, are required to perform duties necessitating their personal presence in the post office.

"2. Mails shall not be made up or handled within reach of unauthorized persons, and such persons shall be excluded from the room appropriated to the use of the post office while the mails are being opened or made up."

Section 775, paragraph 1:

"Ordinary mail matter addressed to fictitious persons or firms, to initials, or to no particular person or firm, unless directed to be delivered at a designated place, as a post-office box, street and number, or to the care of a certain person or firm within the delivery of the post office, shall not be delivered and shall be sent to the Division of Dead Letters and Dead Parcel Post, or branches thereof, or to post offices at division headquarters of the Railway Mail Service, as prescribed by section 818, unless the envelope contains the card of the sender or a request to return, in which case such letters or packages shall be returned accordingly.

"2. Whenever a postmaster has reason to believe that a street or number, designated place, box, or address in care of another is being used by anyone for conducting, under a fictitious address, correspondence forbidden circulation in the mails, he shall promptly report the fact and the reason for his belief to the Solicitor for the Post Office Department and await his instructions, giving notice at the same time at the place where such mail matter has been received that, pending instructions from the Post Office Department, the claimant of such matter must call at the general delivery to receive it upon establishing his identity."

[fol. 12] Section 777, paragraph 1:

"Mail matter should be delivered to the person addressed or in accordance with his written order. When the addressee habitually sends for or receives his mail through his clerk, servant, agent, or some member of his family, and recognizes or acquiesces in such delivery, no written order need be required.

"2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally

given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. Ordinary letters bearing the word 'Personal' in connection with the address shall be delivered as other mail for the addressee is delivered.

"4. When a postmaster is in doubt as to the identity of the addressee he may require proof, and shall exercise great care to make proper delivery, especially where mail matter appears to be of value.

"11. Any number of citizens may employ an agent and give him a written order on the postmaster for their mail; and when such order is presented to the postmaster the mail for such parties, and also mail addressed to a person in care of any such parties, shall be delivered to the agent named."

Section 804, paragraph 1:

"When the writer of any letter on which the postage is prepaid shall indorse on the outside thereof his name and address, such letter shall not be advertised, but, after remaining uncalled for at the office to which it is directed the time the writer may direct or the Postmaster General prescribe, shall be returned to the writer without additional charge for postage, and if not then delivered, shall be treated as a dead letter.

"3. The sender of a letter bearing a specific return request may by subsequent written instruction to the postmaster at the office of delivery lengthen or shorten the time originally allowed for delivery, but no letter shall be returned in less than 3 days (except as provided in sec. 730 as to the recall of mail) nor held for delivery more than 30 days.

"5. First-class, ordinary mail, specifically addressed to street and number, building, rural route, or post-office box, bearing the sender's return request, which cannot be delivered as addressed shall be given directory service; and if addresses, the correctness of which is reasonably certain, are not found, such mail shall be returned at once to

the senders without regard to the number of days specified or implied by the return cards thereon. Such mail shall not be placed in the general delivery nor held to await call."

Section 805, paragraph 1:

"Ordinary mail of the first class (except that described in par. 5 of sec. 804 and single postal cards and post cards), bearing the name and address of the sender without a request specifying a number of days, which after proper [fol. 13] service remains undelivered shall not be advertised but shall be returned to the sender at the expiration of—

Five days if intended for delivery by village or rural carrier.

Ten days if intended for general delivery service at an office having city carrier service.

Fifteen days from offices not having city carrier service unless intended for delivery by village or rural carrier."

Section 810:

"Upon every undelivered article of mail matter shall be indorsed or stamped the reason for nondelivery, using a term that is applicable and easily understood, such as: 'Moved—no address,' 'Unknown at address,' 'No such number,' 'No such street', 'Refused,' 'Deceased', 'Firm dissolved—no order', 'In dispute', 'House quarantined,' or such other terms as clearly explains the failure of delivery; and when no other reason can be ascertained the matter should be indorsed 'Unclaimed'. At offices having city or village delivery service, mail properly distributed to a carrier, but which he is unable to deliver, shall be indorsed by the carrier with the correct reason for nondelivery and the indorsement shall include the initials of the carrier and the number of the route served by him. In indorsing or stamping undelivered matter the original address or postmark shall not be defaced or obscured."

Section 826, paragraph 1:

"All matter unclaimed by the addressees and undelivered matter of every character reaching the Division of Dead Letters and Dead Parcel Post and the branches thereof shall, as far as circumstances and conditions permit, be returned to senders, except such as is obviously of no value or is unmailable under any provision of law, which shall be disposed of as the First Assistant Postmaster General may direct. All registered matter shall be returned to the senders upon payment of any postage due thereon required to be paid before transmission."

Section 933:

"The regulations as to the delivery of mail matter shall apply to the delivery of such matter by letter carriers, except where inapplicable or as otherwise modified herein."

Section 934:

"Carriers shall be careful to deliver mail to the persons for whom it is intended, or to some one authorized to receive it. They shall, in case of doubt, make inquiry with the view of ascertaining the owner. Failing in this, the mail shall be returned to the office, to be disposed of as the postmaster may direct."

Section 935, paragraph 1:

"Carriers shall not deliver mail matter to patrons in the street unless such delivery can be made without unreasonable delay."

[fol. 14] "5. Mail matter intrusted to carriers shall not be exhibited to persons other than those addressed, except on the order of the postmaster or some one authorized to act for him.

"8. Carriers shall not throw away or improperly dispose of mail matter, however trifling or unimportant it may appear to them."

That reference is hereby made to "Postal Laws and Regulations of the United States of America, Edition of 1932, in effect October 1, 1932" for the foregoing postal regulations.

Said Postal Laws and Regulations were enacted and promulgated for the benefit and protection of all persons lawfully using the United States mails, including plaintiff.

At all times herein mentioned, defendant Malone and his said assistants and subordinates were under the duty of delivering to any existing named addressee resident in Montgomery, Minnesota or vicinity all mail addressed to them at Montgomery, Minnesota, and in the case of mail addressed to fictitious persons, of refraining from delivering the same to anyone, except the sender thereof, and defendant Malone and his said assistants and subordinates were entrusted with said mail for the purpose of performing said duties.

XII.

Notwithstanding said duties and trusts, but wholly disregarding the same, and in violation of the United States Postal Laws and regulations and in breach of the aforesaid bond, Exhibit A, defendant Malone and his said assistants and subordinates regularly, customarily, wilfully, negligently and wrongfully delivered to said Hunting all of the mail communications and letters addressed by plaintiff to said fictitious persons at Montgomery, Minnesota, and wrongfully failed to make any attempt to, and in fact did not, deliver the same to the addressees named thereon nor return the same to plaintiff, notwithstanding that they well knew and would in the exercise of reasonable diligence have known that none of the same were in fact addressed to said Hunting or to his care, and that the same in each instance were clearly addressed to names other than said Hunting, and that said names of said addressees were not the names of real persons resident in Montgomery, Minnesota, or vicinity, but were fictitious names.

[fol. 15]

XIII.

Between the dates of August 1, 1934, and April 27, 1935, said Thomas Hunting pursuant to the aforesaid scheme to defraud plaintiff, sold plaintiff and plaintiff purchased and paid said Hunting, for eighty-three (83) false and fictitious contracts and notes, listed in Exhibit B attached hereto and by this reference made a part hereof. Said Exhibit B shows the name of the purported purchaser in each contract, the date of purchase, purported address of each purported pur-

chaser, the original principal amount of each contract and note, the uncollected balance thereof, and the type, motor and serial number of the automobile purported to be covered by each purported conditional sales contract.

The aggregate unpaid balance of said eighty-three contracts is the sum of $34,997.03. Said Hunting died January 13, 1936, and both said Hunting and his estate were and are insolvent and any claim or judgment against him or his estate is wholly uncollectible; and said eighty-three purported contracts and notes are fictitious and do not represent any valid obligation on the part of anyone to pay the amounts recited therein and are worthless and uncollectible.

XIV.

As a proximate result of defendant Malone's breach of duty and trust and violations of the Postal Laws and Regulations aforesaid, said Hunting was enabled to and did carry on and execute his fraudulent scheme aforesaid, and was enabled to and did intercept at said Post Office all mail communications and letters addressed and mailed by plaintiff to the purported purchasers shown in Exhibit B, and to the purported credit references in connection therewith, and was enabled to and did give forged and fictitious credit responses to plaintiff in the names of the purported credit references in said purported purchasers' statements; and was enabled to and did intercept at said Post Office all notices and memorandum books mailed by plaintiff to [fol. 16] the purported purchasers shown in Exhibit B, and was enabled to and did make payments in the names of said purported purchasers; and was enabled to and did offer and sell said contracts and notes shown in Exhibit B to plaintiff; and was enabled to and did induce plaintiff to believe that said contracts and credit references were in all respects regular and genuine, and to prevent plaintiff from discovering the fraud so practiced upon it. On or about May 1, 1935, plaintiff for the first time discovered the aforesaid fraud.

Had defendant Malone and his assistants and subordinates at said Post Office complied with, and discharged

and performed the duties and trusts imposed upon them by the postal laws of the United States and by the regulations of the Post Office Department, plaintiff would have discovered the false, forged or fictitious character of the contracts and notes tendered to it for purchase by said Hunting, and said Hunting would not have been able either to effectuate or to continue his aforesaid scheme, and said Hunting was enabled to and did effectuate and continue the same, solely by reason of, as a result of, and on account of, the continued violations and breaches aforesaid of defendant Malone and his said assistants and subordinates.

XV.

As a proximate result of the aforesaid violations and breaches of duty and trust by defendant Malone, plaintiff was and is damaged in the amount of $34,997.03.

The aforesaid violations and breaches of duty and trust constituted and constitute breaches of the conditions of said bond, Exhibit A. Plaintiff was and is a person for whose use, benefit, and protection said bond was given, and by reason of the breaches aforesaid resulting proximately in the damage to plaintiff as aforesaid, defendant National Surety Corporation is indebted to plaintiff in the sum of $16,000, being the full penalty thereof, together with interest thereon as allowed by law.

[fol. 17] Wherefore, plaintiff prays judgment against Defendant National Surety Corporation in the sum of Sixteen Thousand Dollars ($16,000) together with interest thereon according to law from and after May 1, 1935, together with its costs and disbursements herein, and against defendant Patrick J. Malone, in the sum of Thirty-four Thousand Nine Hundred Ninety-seven and 03/100 Dollars ($34,997.03), with interest thereon according to law from and after May 1, 1935, together with its costs and disbursements herein.

LEONARD, STREET & DEINARD,
Attorneys for Midland Loan Finance Company,
1056 Andrus Building,
Minneapolis, Minnesota.

Dated: July 14, 1936.

[fol.18] **Exhibit A.**

3 7-24-34.

Post Office Department

Bond of Presidential Acting Postmaster

Know All Men By These Presents, That we, Patrick J. Malone, of Montgomery, in the County of Le Sueur, State of Minnesota, as principal, and National Surety Corporation, a corporation of New York, as surety, do hereby bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, to pay to the United States of America the sum of Sixteen thousand dollars ($16,000).

In Witness Whereof we have hereunto subscribed our names and affixed our seals this 1st day of August, in the year one thousand nine hundred and thirty-four.

Whereas the above-bound Patrick J. Malone took charge of the post office at Montgomery on August 1st, 1934, has been appointed acting postmaster at the office aforesaid, by the Postmaster General in accordance with the act approved March 1, 1921, and has duly executed the prescribed oath of office.

Now the Condition of This Obligation Is, That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force.

PATRICK J. MALONE, (Seal)

Signed and sealed in the presence of—

Wm. M. Kozel,
(Witness to signature of
acting postmaster)

NATIONAL SURETY CORPORATION,
By L. A. Green, Its Attorney-in-fact,
(L. A. Green
Agency at St. Paul, Minnesota.

S. Loeffelholz,
(Witness to signature of officer
or agent of surety company)

C. Whythe.
(Seal of Surety Company)

Bond accepted Aug. 14, 1934
for the Postmaster General.

By W. W. HOUES,
First Assistant Postmaster General.

[fol. 19] Exhibit B

Name of Purchaser	Date of Purchase	Address of Purchaser	Original Principal Amount of contract and note	Uncollected balance	Type	Motor No.	Serial No.
Bendzick, Michael	Oct. 22, 1934	Montgomery	641.76	412.56	'34 Chrysler Sedan	CA25923	6672284
Ambrose, Frank F.	Jan. 2, 1935	"	336.48	252.36	'33 Plymouth Coach	PD93476	208701
Augsperger, Albert	Feb. 27, 1935	"	507.60	465.30	'35 Ford 4 Door Sedan	18-1521096	
Bergman, John	Feb. 18, 1935	"	598.80	548.90	'35 Plymouth 4-door sedan	PJ19796	1039220
Bevans, Joseph	Sept. 21, 1934	"	336.48	168.24	'33 Ford Tudor	18-213272	
Bjornson, Lawrence	Jan. 28, 1935	"	592.80	494.00	'35 Plymouth Sedan	PJ6926	2401147
Boumon, Frank F.	March 16, 1935	"	456.00	456.00	'35 Ford Coach Sedan	1384726	
Bounderson, Anna M	Dec. 11, 1934	"	576.00	432.00	'35 Plymouth/	PJ4675	2309296
Bounderson, Carl	Feb. 27, 1935	"	613.76	569.92	" " "	PJ6926	2401147
Brandt, Adolph	Apr. 21, 1935	"	406.08	406.08	'34 Ford Truck	18-750407	
Carlson, Swen O.	Nov. 5, 1934	"	690.00	402.50	'34 Chrysler Sedan	CA23781	6670246
Carney, Charles E.	Oct. 2, 1934	"	707.00	404.00	'34 Chrysler Sedan	CA18621	6665973
Clark, John C.	March 18, 1935	"	592.64	592.64	'35 Plymouth Tudor	PJ145918	2500594
[illegible]	Nov. 5, 1934	"	567.00	364.50	'34 Plymouth Sedan	PF84609	1935464
Engdahl, Oscar	Oct. 27, 1934	"	393.60	229.60	'34 Ford pickup	18-758568	
Fillrath, Hubert	Aug. 31, 1934	"	336.48	140.20	'33 Chevrolet Coach	3947414	CA1077490
Fuhrman, Frank	Dec. 15, 1934	"	189.60	142.20	'30 Ford Tudor	A2877062	
Halverson, Elmer	Apr. 6, 1935	"	628.16	628.16	'35 Plymouth Sedan	PJ175292	2522065
Hinderschied, Peter	Nov. 19, 1934	"	187.00	130.90	'31 Oakland Sedan	297667	283255
Hoey, James	Feb. 26, 1935	"	829.60	777.75	'35 Chrysler Brom	CZ3821	6700874
Hoffmeister, Edw.	Sept. 27, 1934	"	555.38	317.36	'34 Plymouth Sedan	PE2381832	213302
Holicky, Edw. G.	Jan. 1, 1935	"	587.40	440.55	'35 Ford Sedan	18-1247809	
Huebner, William	March 16, 1935	"	711.04	711.04	'35 Chrysler Brom	C6-7746	6807158

						Sedan		
Carney, Charles E.	Oct. 2, 1934	"	707.00	404.00	'34 Chrysler	CA18621	6665973	
					Sedan			
Clark, John C.	March 18, 1935	"	592.64	592.64	'35 Plymouth	PJ145918	2500594	
					Tudor			
[illegible], Ralph	Nov. 5, 1934	"	567.00	364.50	'34 Plymouth	PF84609	1935464	
					Sedan			
Engdahl, Oscar	Oct. 27, 1934	"	393.60	229.60	'34 Ford pickup	18-758568		
Fillrath, Hubert	Aug. 31, 1934	"	336.48	140.20	'33 Chevrolet	3947414	3CA1077490	
					Coach			
Fuhrman, Frank	Dec. 15, 1934	"	189.60	142.20	'30 Ford Tudor	A2877062		
Halverson, Elmer	Apr. 6, 1935	"	628.16	628.16	'35 Plymouth	PJ175292	2522065	
					Sedan			
Hinderschied, Peter	Nov. 19, 1934	"	187.00	130.90	'31 Oakland	297667	283255	
					Sedan			
Hoey, James	Feb. 26, 1935	"	829.60	777.75	'35 Chrysler	CZ3821	6700874	
					Brom			
Hoffmeister, Edw.	Sept. 27, 1934	"	555.38	317.36	'34 Plymouth	PE2381832	213302	
					Sedan			
Holicky, Edw. G.	Jan. 1, 1935	"	587.40	440.55	'35 Ford Sedan	18-1247809		
Huebner, William	March 16, 1935	"	711.04	711.04	'35 Chrysler	C6-7746	6807158	
					Brom			
Hughes, Daniel	Dec. 1, 1934	"	707.00	505.00	'34 Chrysler	CA24484	6671693	
					Sedan			
Husby, Joe J.	March 23, 1935	"	765.60	765.60	'35 International			
					Truck	21312	8658	
Innes, Ervin R.	April 20, 1935	"	558.60	558.60	'35 Ford Sedan	18-1378116		
	Feb. 12, 1935	"	550.64	485.87	'35 Ford Sedan	18-1442021		
					Sedan			
Koch, Matt A.	Jan. 8, 1935	"	613.76	482.24	'34 Chrysler/	CA24848	6672057	
Kohler, John Sr.	Nov. 14, 1934	"	690.00	460.00	" " "	Ca24183	6670846	
Kohler, Wm. O.	Sept. 5, 1934	"	633.00	263.75	'34 Chrysler	CA10575	6658564	
					Brom			
Latzke, George	Feb. 4, 1935	"	805.92	705.18	'35 Chrysler	6703606	CZ1585	
					Sedan			
Lennon, Wm. G.	Jan. 22, 1935	"	456.00	380.00	'35 Ford Coupe	18-1349023		
Lockwood, Ralph	Jan. 14, 1935	"	758.40	663.60	'35 Chrysler	CZ1138	6800596	
					Coupe			
Lund, Oscar	Apr. 20, 1935	"	417.60	417.60	'33 Dodge Sedan	DP63810	3637649	
Lund, Carl	Apr. 13, 1935	"	592.64	592.64	'35 Plymouth	PJ185345	2530229	
					Sedan			
Lundberg, Carl E.	Sept. 6, 1934	"	539.76	224.90	'34 Ford Sedan	18-1132418		

[fol. 20]

Mauer, Henry	Feb. 13, 1935	Montgomery	553.20	507.10	'35 Plymouth Tudor	PJ25677	1045101
M——th, Jerome	March 9, 1935	"	570.00	522.50	'35 Chevrolet Sedan	4804932	1EA011286
Monnahan, Louis J.	March 21, 1935	"	711.04	711.04	'35 Chrysler Sedan	CZ1948	6704913
Morford, Edw. J.	Aug. 20, 1934	"	574.88	323.37	'34 Plymouth Coach	PE187472	2366806
Munger, Albert	Feb. 4, 1935	"	417.60	348.00	'33 Chrysler Coach	CO10849	6585757
Nehlig, Julius	Apr. 5, 1935	"	525.00	525.00	'35 Ford Tudor	18-1499987	
Nyquest, Henry	March 9, 1935	"	840.00	780.00	'35 Chrysler Sedan	CZ7029	6705078
Osterman, Paul	Jan. 30, 1935	"	690.00	575.00	'35 Chrysler Brom	C6-3328	6602063
Patterson, Ray E.	Jan. 19, 1935.	"	496.20	413.50	'35 Ford Coupe	18-1304849	
Patzel, Otto H.	Aug. 25, 1934	"	560.00	280.00	'34 Plymouth Coach	PE206668	2374714
Peschken, Charles	Apr. 22, 1935	"	592.64	592.64	'35 Plymouth Sedan	PJ186276	2531726
Peterson, Raymond	Jan. 11, 1935	"	711.04	622.16	'35 Chrysler Sedan	Cz1247	6801734
Rademacher, Claude	Apr. 1, 1935	"	794.08	794.08	'35 Chrysler Brom	C6-10375	6808637
Read, Walter	Nov. 2, 1934	"	244.80	142.80	'32 Ford Tudor	516986	
Roberts, Glen	Nov. 12, 1934	"	459.00	306.00	'34 " "	18-761394	
Ruppert, Louis	Apr. 1, 1935	"	592.64	592.64	'35 Plymouth Coupe	PJ154649	2507760
R——ing, George	Aug. 13, 1934	"	730.38	365.19	'34 Chrysler Coupe	CZ1847	6650609
Sames, Matt	Sept. 17, 1934	"	648.00	405.00	'34 Chrysler Brom	CZ19392	6721275
Schmidt, Geo. A.	Sept. 24, 1934	"	266.88	133.44	'32 Chevrolet Coach	3333195	a1BA0837043
Schmidt, Martin	March 16, 1935	"	592.64	592.64	'35 Plymouth Sedan	PJ130741	2488597
Schneider, Anton	Aug. 9, 1934	"	592.64	333.36	'34 Plymouth Sedan	PE186572	2357807
Schrank, August	Aug. 4, 1934	"	473.40	157.80	'34 Ford Tudor	18-983504	
Schultz, Roy	Aug. 11, 1934	"	452.40	188.50	'33 Chrysler Coach	C010753	6584852
Senell, David	Aug. 1, 1934	"	304.68	101.56	'33 Plymouth Sedan	PC53533	1812245
Seoffker, Robert	Dec. 14, 1934	"	530.40	397.80	'34 Ford Delivery	18-960865	
Simonette, Lenard	Oct. 25, 1934	"	266.88	155.68	'32 Ford Tudor	B5130724	
Spaetgens, Mike	Oct. 24, 1934	"	507.60	296.10	'34 " Coupe	18-1190854	
Stanek, Leonard	Mar. 22, 1935	"	616.32	577.60	'35 Chevrolet Sedan	4832570	a1EA021206
Stein, Lester	Apr. 15, 1935	"	628.16	628.16	'35 Plymouth Sedan	PJ179464	2525011
Sterling, Edward	Jan. 7, 1935	"	462.00	346.50	'34 Ford Coach	18-1127817	
Struck, August	Nov. 26, 1934	"	530.40	353.60	'34 Plymouth Sedan	PF876138	1938473

						Sedan		
Schneider, Anton	Aug. 9, 1934	"	592.64	333.36	'34 Plymouth Sedan	PE186572	2357807	
Schrank, August	Aug. 4, 1934	"	473.40	157.80	'34 Ford Tudor	18-983504		
Schultz, Roy	Aug. 11, 1934	"	452.40	188.50	'33 Chrysler Coach	C010753	6584852	
Senell, David	Aug. 1, 1934	"	304.68	101.56	'33 Plymouth Sedan	PC53533	1812245	
Seoffker, Robert	Dec. 14, 1934	"	530.40	397.80	'34 Ford Delivery	18-960865		
Simonette, Lenard	Oct. 25, 1934	"	266.88	155.68	'32 Ford Tudor	B5130724		
Spaetgens, Mike	Oct. 24, 1934	"	507.60	296.10	'34 " Coupe	18-1190854		
Stanek, Leonard	Mar. 22, 1935	"	616.32	577.60	'35 Chevrolet Sedan	4832570	a1EA021206	
Stein, Lester	Apr. 15, 1935	"	628.16	628.16	'35 Plymouth Sedan	PJ179464	2525011	
Sterling, Edward	Jan. 7, 1935	"	462.00	346.50	'34 Ford Coach	18-1127817		
Struck, August	Nov. 26, 1934	"	530.40	353.60	'34 Plymouth Sedan	PF876138	1938473	
Stube, Edward	Dec. 12, 1934	"	576.80	468.66	'35 " "	PJ5743	2400354	
Sullivan, John	Apr. 15, 1934	"	711.04	711.04	'35 Chrysler Brom	C6-11887	6810006	
Thompson, Martin	Oct. 15, 1934	"	484.80	282.80	'34 Ford Sedan	18-1194285		
Thorne, Albert	Apr. 2, 1935	"	348.00	348.00	'33 Plymouth Sedan	PD32437	2029468	
Thyson, J. Henry	Dec. 11, 1934	"	242.00	169.40	'31 Chrysler Sedan	CM4465	6523581	
Trapp, James E.	Apr. 23, 1935	"	583.38	583.38	'35 Plymouth Sedan	PJ197275	2857612	
Uhler, Milo	Jan. 16, 1935	"	576.00	480.00	'35 Plymouth Sedan	PJ7452	2401190	

[fol. 21]

Waajatke, Jos. R.	Jan. 3, 1935	Montgomery	556.96	452.53	'35 Plymouth Coach	PJ5782	2400437	
Walters, Russell	August 25, 1934	"	547.20	228.00	'34 Plymouth Sedan	PE206251	2374234	
Wietzke, William	Dec. 1, 1934	"	278.40	185.60	'34 Plymouth Sedan	PC113051	1863452	
Warponn, Norman	Aug. 18, 1934	"	484.80	202.00	'34 Ford Tudor	18-775878		
Whitesides, Louis	Aug. 1, 1934	"	711.04	355.52	'34 Chrysler Sedan	CA19961	6701095	
Wollers, Albert S.	Sept. 20, 1934	"	567.00	324.00	'34 Plymouth Sedan	PE208744	2395826	
Zacher, Charles	Nov. 17, 1934	"	519.00	346.00	'34 Ford Sedan	18-1195117		
Zieher, Albert	Feb. 16, 1935	"	584.40	535.70	'35 " "	18-1484756		
Zimmer, Ernest D.	Sept. 15, 1934	"	527.40	263.70	'34 " "	18-1165166		

Filed October 2, 1936. MARGARET L. MULLANE, Clerk, By Thomas H. Howard, Chief Deputy

[fol. 22] (Demurrer of Defendant, National Surety Corporation, to Complaint.)

The defendant National Surety Corporation hereby demurs to plaintiff's complaint for the reason that it appears therefrom:

1. That there is a defect of parties plaintiff or defendant.

2. That the facts stated do not constitute a cause of action.

DOHERTY, RUMBLE & BUTLER,
Attorneys for Defendant National Surety Corporation,
E-1006 First National Bank Bldg.,
Saint Paul, Minnesota.

[fol. 23] State of Minnesota,
County of Ramsey,—ss.:

Emma H. Stoven, of said County and State, being duly sworn, deposes and says that she is a clerk in the office of Doherty, Rumble and Butler, the attorneys for National Surety Corporation, a corporation, one of the defendants in the within entitled action; that on the fourth day of November, 1936, she served the annexed Demurrer by depositing a true and correct copy of the same in the United States Mails at the City of Saint Paul, Minnesota, properly enveloped, with postage prepaid thereon, and addressed to Messrs. Leonard, Street & Deinard, Attorneys at Law, 1036 Andrus Building, Minneapolis, Minnesota; that said Leonard, Street & Deinard are the attorneys for the plaintiff in said action and reside at the City of Minneapolis, Minnesota.

EMMA H. STOVEN.

Subscribed and sworn to before me this fifth day of November, 1936.

ADELLA WARDRUM,
Notary Public,
Ramsey County, Minn.

(Notarial Seal)

My Commission expires Oct. 22, 1937.

(Endorsed): Filed December 2, 1936. Margaret L. Mullane, Clerk, By Thomas M. Howard, Chief Deputy.

[fol. 24] (Demurrer of Defendant, Patrick J. Malone, to Complaint.)

Comes now the defendant, Patrick J. Malone, and demurs to the Complaint of plaintiff herein, on the following grounds:

I.

That said plaintiff, Midland Loan Finance Company, has not legal capacity to sue, in this, that said Midland Loan Finance Company, by, and through their attorneys, for their own benefit, individually, purport to bring this action, for and in the name of the United States of America, the only party having legal capacity to bring said action, having brought said action without the permission, or consent, of said United States of America.

II.

That there is a defect in parties plaintiff, by reason of the omission of the United States of America, the obligee, named in the bond alleged, to have been breached in plaintiff's complaint herein; in that the United States of America, is a necessary party, and the only party able to maintain an action for breach of the bond above mentioned.

III.

That several causes of action have been improperly united as follows, to-wit: That said complaint alleges a cause of action for breach of a bond of the defendant, Patrick J. Malone, and National Surety Company, a corporation, defendants, running to the United States of America, [fol. 25] as alleged in plaintiff's complaint herein; that said cause of action can be maintained only by the United States of America, obligee, named in said bond, and plaintiff has no cause of action thereon; that said complaint purports to alleging a cause of action to recover damages for the purported negligence of Patrick J. Malone.

IV.

That the complaint does not allege facts sufficient to constitute a cause of action.

Wherefore, said defendant, Patrick J. Malone, prays that said demurrer to the complaint of plaintiff herein, be sustained on the grounds hereinbefore set forth.

GEORGE T. HAVEL,
Attorney for defendant,
Patrick J. Malone,
Le Center, Minnesota.

Due and personal service of the within Demurrer of Defendant admitted this 4th day of November, 1936.

LEONARD, STREET & DEINARD,
Attorney for Plaintiff,
Midland Loan Finance Co., a corp.

Filed November 4, 1936. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

[fol. 26] (Order Overruling Demurrers to Complaint.)

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

This matter came on before the court at a special term thereof held in the City of Minneapolis on the 14th day of December, 1936, on demurrers of the defendants to the complaint. There were the following appearances: Messrs. Leonard, Street & Deinard on behalf of Midland Loan Finance Company; Mr. George T. Hovel on behalf of defendant Patrick J. Malone; and Doherty, Rumble, & Butler on behalf of National Surety Company.

The demurrers of the defendants are alike in substance and urge that there exists a defect of parties plaintiff or

defendant and that the facts stated do not constitute a cause of action.

Briefly, the complaint alleges that defendant Malone was acting Postmaster at Montgomery, Minnesota, under authority of and amenable to law and the Post Office regulations. One Hunting was an auto dealer at the same place engaged in an unlawful practice of making out false and forged conditional sales contracts and notes, which Hunting tendered for sale to the Midland Company. In order to determine the worth of such contracts and notes before buying, the Midland Company mailed letters to fictitious persons supplied as credit references for the reputed purchasers. That Malone in violation of law and duty, regularly, customarily, negligently and wrongfully gave such [fol. 27] letters to Hunting, whereby the latter was enabled to forge replies to such letters, deceive the Midland Company and ultimately to make payments in accordance with the letters and schedules so intercepted. That the Midland Company, without knowledge of the foregoing acts by Malone in the interest of Hunting, innocently relied upon the replies received believing them to be genuine, and thereupon purchased contracts and notes from Hunting. That the Midland Company was prevented from discovery of the Hunting wrongful conduct and the deception practiced by him because of Malone's alleged deceit and breach of duty, which breach the Midland Company claims is actionable on account of damages proximately resulting therefrom to it. Recovery is sought against the National Surety Company because of a bond which it wrote for Malone, such bond being required by statute and conditioned as follows:

"Now the condition of this obligation is, That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to

law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force."

The obligee named in the bond is the United States. This action rests upon the alleged breach of the first of the three clauses incorporated in the bond, to wit, to "faithfully discharge all duties and trusts imposed on him as acting Postmaster either by law or by the regulations of the Post Office Department."

The defendants insist that consent of the Government to maintain the action is a prerequisite and that the damages are not proximate but remote. While the questions presented by the two demurrers are questions of law, and while doubt may exist as to the right of the Midland Company to maintain the action in the name of the United States, the case of U. S. vs. Howard, 184 U. S. 676, involving recovery on a United States District Court clerk's [fol. 28] bond where Government consent was not obtained, seems to support the Midland Company's claim. On argument it appeared that the Midland Company had notified the Attorney General of the United States of the pendency of the action. It further appeared that Malone, following the events here recited, was made a regular postmaster.

The evidence in detail bearing on the question of the causal relation between Malone's alleged delinquencies and the claimed losses of the Midland Company would be enlightening and valuable to a court in passing upon whether the damage claimed was proximate or remote. Not being prepared at this time to say that a cause of action does not exist, and viewing the matter as one of Federal law, and believing that with the submission of all the evidence a just determination can the more easily be ascertained, and not attempting here an analysis of the cases presented by the very able briefs submitted, I have concluded that the demurrers should be overruled. Although it was an equitable proceeding and involved the question of jurisdiction, support in principle is found for the foregoing conclusion in the late opinion of the Circuit Court of Appeals of this circuit in the case of Guy A. Thompson vs. Terminal Shares, etc., et al., 89 Fed. (2) 652, wherein Judge Gardner adopted language from Winget vs. Rockwood, 69 Fed. (2) 326, as follows:

"A suit should not ordinarily be disposed of on such a motion unless it clearly appears from the allegations of the bill that it must ultimately, upon final hearing, be dismissed. To warrant such dismissal, it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated. * * * That rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill."

The demurrers are overruled, with leave to answer granted. It is so ordered. Exception granted.

MATTHEW M. JOYCE,
United States District Judge.

Dated July 3, 1937.

Filed July 3, 1937. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

[fol. 29] (Answer of Defendant, National Surety Corporation.)

The defendant National Surety Corporation for its separate answer to the complaint of the plaintiff herein:

I.

Alleges it has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered I, V, VI, VII, VIII, IX, X, and XIII of plaintiff's complaint, and therefore denies all such allegations. With respect, however, to the allegations contained in subdivisions (g), (h), (i), and (k) of paragraph X, it is affirmatively informed and believes that all allegations therein as to conspiracy, confederation, arrangement, or agreement between Thomas Huntington and the defendant Patrick J. Malone and his assistants and subordinates, and all allegations of aid, participation, and connivance of the defendant Malone, his assistants and subordinates, in the alleged fraudulent schemes and practices of said

Thomas Huntington are wholly untrue, and upon information and belief this defendant alleges that if during the [fol. 30] period referred to in the complaint any mail matter deposited by the plaintiff was from the post-office at Montgomery, Minnesota, delivered to others than the addressees, such delivery was by subordinate clerks in said office innocently made and in justifiable belief that such delivery was authorized by the addressees of such mail.

II.

Admits the allegations contained in paragraph II of said complaint, and admits that the court designated in the complaint has jurisdiction of the action, and admits that on or about August 1, 19[illegible], the defendant Patrick J. Malone was appointed postmaster for the United States Post-Office at Montgomery, in the County of Le Sueur and State of Minnesota, and that to qualify as such the said Malone, as principal, and this answering defendant, as surety, did execute and deliver to the United States of America a bond, of which Exhibit A attached to plaintiff's complaint is a true and correct copy, and that said bond was approved by or on behalf of the Postmaster General of the United States.

Expressly denies that said bond was for the use, benefit, and protection of all persons lawfully using the United States mails at, to, and from Montgomery, Minnesota, including plaintiff, and on the contrary alleges that said bond was for the use, benefit, and protection of the United States of America only.

III.

Admits that the defendant Patrick J. Malone, while acting as postmaster of the post-office at Montgomery, Minnesota, and his assistants and subordinates, were charged with such duties as were imposed upon them as such by the then existing laws and regulations of the Post-Office Department of the United States.

[fol. 31] Admits that during the period referred to in paragraph XI of plaintiff's complaint, there were in force and effect certain regulations promulgated by the Postmaster General of the United States, of which true copies are set forth in said paragraph.

IV.

Alleges that this action was commenced without the consent or authority of the United States or of its Postmaster General or Postal Department, and that no consent to the prosecution or maintenance of the action by the United States or the Postmaster General or Postal Department has ever been granted.

V.

Except as hereinbefore admitted, denied, or otherwise pleaded, this answering defendant denies each and every allegation contained in plaintiff's complaint.

Wherefore, this answering defendant prays that plaintiff take nothing by this action as to it, but that it have judgment herein against the plaintiff upon the merits, including judgment for its costs and disbursements incurred herein.

DOHERTY, RUMBLE, BUTLER, SULLIVAN & MITCHELL,
Attorneys for Defendant National Surety Corporation,
E-1006 First National Bank Building, Saint Paul, Minnesota.

Filed July 24, 1937. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

[fol. 32] (Answer of Defendant, Patrick J. Malone.)

Comes now the defendant, Patrick J. Malone, and for his Separate Answer to the Complaint of Plaintiff herein, alleges:

I.

Admits that the Midland Loan Finance Company, a corporation, at the time of the commencement of this action, was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota; further admits that at the time of the commencement of this action, defendant, National Surety Company, was, and still is, a corporation, duly organized and existing

under and by virtue of the laws of the State of New York; further admits that shortly prior to July 31, 1934, defendant, Patrick J. Malone, was duly designated and appointed acting postmaster at the United States post office at Montgomery, Le Sueur County, State of Minnesota; further admits that thereafter Patrick J. Malone, became the duly appointed postmaster in and for said United States Post Office, in said City of Montgomery, and duly qualified as such; further admits that Tom Hunting was engaged in the automobile business in the City of Montgomery, Minnesota, under his own name and under the name of Tom Hunting Company.

II.

Except as hereinbefore admitted, said defendant, upon the ground that he has not sufficient information wherewith [fol. 33] to form a belief, denies each and every allegation, matter and thing, in said Complaint contained, and the whole thereof, save and except insofar as is hereinafter otherwise qualified, explained or specifically denied.

III.

Defendant, Malone, further specifically denies that the injuries and other damages set forth in the complaint, was caused by any breach of duty or trust on the part of said defendant, Malone, or any wilful, negligent, or unlawful acts of said defendant, Malone, as set forth in said complaint, but alleges in truth and in fact, that any damages that may have been sustained by said plaintiff, were due wholly and solely, to the criminal acts of said Hunting as set forth in said complaint, and that said damage was proximately caused by the acts of said Hunting, and in no way caused by any neglect of duty, wilful, wrongful, or negligent acts on the part of said defendant, Malone.

IV.

Said defendant, Malone, further specifically denies, that he conspired or confederated with said Tom Hunting, as stated in plaintiff's complaint herein.

Wherefore, said defendant, Malone, prays that the pretended complaint of plaintiff herein be dismissed, and that he have his costs and disbursements incurred herein.

GEORGE T. HAVEL,
Attorney for Defendant, Malone,
Le Center, Minnesota.

Filed July 23, 1937. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 34] (Reply of Plaintiff to Answer of Defendant, National Surety Corporation.)

Comes Now Midland Loan Finance Company, use-plaintiff above named, and for its reply to the separate answer of defendant National Surety Corporation:

I.

Generally and specifically denies each and every allegation, matter, statement and thing in said separate answer contained, and each and every part thereof, save and except as the same admits the allegations contained in plaintiff's complaint.

II.

Alleges that due and sufficient notice of the commencement, pendency and prosecution of this action for the use of plaintiff was given to the Postmaster General, Post Office Department and the Attorney General of the United States.

Wherefore, plaintiff prays judgment as in his complaint demanded.

Dated this 24th day of July, 1937.

LEONARD, STREET AND DEINARD,
Attorneys for Plaintiff.
1036 Andrus Building,
Minneapolis, Minnesota.

Filed July 26, 1937. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 35] (Reply of Plaintiff to Answer of Defendant, Patrick J. Malone.)

Comes Now Midland Loan Finance Company, use-plaintiff above named, and for its reply to the separate answer of defendant Patrick J. Malone:

I.

Generally and specifically denies each and every allegation, matter, statement and thing in said separate answer contained, and each and every part thereof, save and except as the same admits the allegations contained in plaintiff's complaint.

Wherefore, plaintiff prays judgment as in his complaint demanded.

Dated this 24th day of July, 1937.

LEONARD, STREET AND DEINARD,
Attorneys for Plaintiff,
1036 Andrus Building,
Minneapolis, Minnesota.

Filed July 26, 1937. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 36] Order Extending Time to File Bill of Exceptions.

The above plaintiff having made application for an order extending the time for signing, allowance, serving and filing of a Bill of Exceptions herein, and good cause being shown therefor, such application is hereby granted, and the time for signing, allowance, serving and filing of the Bill of Exceptions of the above named plaintiff is hereby extended up to and including September 15, 1938.

GUNNAR H. NORDBYE,
District Judge.

Date: August 15, 1938.

Filed August 15, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 37] (Order further extending time to file Bill of Exceptions.)

The above plaintiff having made application for an order extending the time for signing, allowance, serving and filing of a Bill of Exceptions herein, and good cause being shown therefor, such application is hereby granted, and the time for signing, allowance, serving and filing of the Bill of Exceptions of the above named plaintiff is hereby extended up to and including October 15, 1938.

GUNNAR H. NORDBYE,
District Judge.

Dated: September 15th, 1938.

Filed September 15, 1938. Margaret L. Mullane, Clerk. By Chell M. Smith, Deputy.

[fol. 39] Bill of Exceptions.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

vs.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

Before Honorable Gunnar H. Nordbye, District Judge, with a Jury at Law.

3681 Law.

This action was commenced in the United States District Court, District of Minnesota, Fourth Division, by the filing of a complaint at law, which by this reference is made a part hereof, and by the issuance of summons, dated October 6, 1936, which was duly served by the United States Marshal on defendant National Surety Corporation on October 6, 1936, and on defendant Patrick J. Malone on October 7, 1936.

Thereafter, demurrer to said complaint was interposed by defendant National Surety Corporation, which demurrer is by this reference made a part hereof. Demurrer to said complaint was also interposed by defendant Patrick

J. Malone, which demurrer is by this reference made a part hereof.

The issues of law raised by said demurrers thereafter duly came on to be heard and were heard before Honorable Matthew M. Joyce, one of the judges of said United [fol. 40] States District Court, on December 14, 1936, and said demurrers were overruled by order entered and filed on July 3, 1937. Said order is by this reference made a part hereof.

Thereafter, answer was interposed by defendant National Surety Corporation, which answer is by this reference made a part hereof.

Thereafter, answer was interposed by defendant Patrick J. Malone, which answer is by this reference made a part hereof.

Thereafter, plaintiff interposed reply to the separate answer of defendant National Surety Corporation, which reply is by this reference made a part hereof.

Thereafter, plaintiff interposed reply to the separate answer of defendant Patrick J. Malone, which reply is by this reference made a part hereof.

Said action being on the General Term Calendar of said District Court, came on for trial before Honorable Gunnar H. Nordbye and a jury, and the trial commenced on October 6, 1937. Plaintiff appeared by Messrs. Leonard, Street, and Deinard, Benedict Deinard, Esq., Hyman Edelman, Esq., and Leslie A. Grant, Esq., its attorneys; defendant National Surety Corporation appeared by Messrs. Doherty, Rumble, Butler, Sullivan & Mitchell, Pierce Butler, Esq. and Robert O. Sullivan, Esq., its attorneys; and defendant Patrick J. Malone appeared by George T. Havel, Esq., his attorney.

In the course of the proceedings, counsel for plaintiff did take and allege sundry exceptions to the rulings of the court, which exceptions are hereinafter set forth.

At the trial of this cause in this court at the September 1937 Term of said Court, Honorable Gunnar H. Nordbye, Judge, presided, and the following proceedings were had:

[fol. 41] A jury was impaneled and sworn according to law, and thereupon plaintiff, through its counsel, made the following opening statement to the jury:

Mr. Deinard: "If the Court please, and members of the jury: At this point it is customary for the plaintiff's attorney to make an opening statement to the jury. This opening statement is not by way of argument and is not to be taken as an argument. After the trial commences, as most of you know, the evidence is received verbally from the witnesses who will take the witness chair and recite to you such evidence as counsel proposes to offer, and such as the Court thinks is properly offered, but the evidence, as it comes in, is necessarily piece-meal. It is something like a jigsaw puzzle. One witness may be called, for instance, on one minor point about which he knows the facts; another witness is called on another minor point, and unless you have some idea to start with, of what the lawsuit is about, and what this puzzle is going to look like generally, when the pieces are put together, you will have difficulty in following the separate items of testimony; so this statement is simply by way of a bird's-eye view as to what our claim is, so that when the witnesses testify, and the documents and other exhibits are offered in evidence, you will know where they fit in the picture, what their significance is; and so the plaintiff is allowed to outline to you briefly what we claim in this case, and what we intend to show by our proof.

[fol. 42] As the Court has already indicated to you, and as most of you know, automobiles now-a-days are largely sold on time, not for cash. Cash purchasers, I think, are quite out of the ordinary. The average man buys his car on a credit basis. He pays some cash down, gets possession of the car, and agrees to pay the balance in installments, a variety of installment purchases, the same as you now go to a furniture store and buy a set of bedroom furniture, and pay so much down, and sign a contract to pay in installments. Most automobiles are bought on the same basis, and have been for some years, so that when a man buys a car from an automobile dealer he pays some cash payment, or he turns in his old car by way of a down pay-

ment, gets possession of the car, and he signs a conditional sales contract.

Sometimes he signs a note—ordinarily he does—and the note and the contract evidence his obligation to pay the balance of the purchase price of the car. I do not want to labor that point with you, because you all undoubtedly are in some respect, familiar with that situation.

Now to an ordinary automobile dealer, carrying a large number of customers on a credit basis would, of course, involve a large capital. In other words, an automobile dealer would have to be his own banker if he carried a large volume of people on credit. Therefore, over a period of some [fol. 43] years, and largely due to the increased amount of automobile business, there has developed a system whereby finance companies buy the paper from the automobile dealer, pay him out in cash for the balance of his credit payments, at some discount, whatever it happens to be, so as to make it profitable to the finance company, and the finance company carries the contract, collects the payments as they fall due, or they have certain remedies in case the purchaser does not pay up. In other words, the finance company acts as banker for the local automobile dealer so that he can do business on a credit basis with his customers.

Now when a retail dealer sells a car on a conditional sales contract in the way I have described, he retains the title to the car. Title to the car remains in the automobile dealer until the purchase price, or until all of the deferred balance of the purchase price has been paid. Then the purchaser gets a bill of sale to the car from the dealer.

When an automobile dealer sells the paper to a finance company with whom he happens to be doing business, he transfers to the finance company first of all, the contract, that is, the conditional sales contract, including the title to the car, which the finance company holds as security for the payment of the rest of the contract; and secondly, he transfers to the finance company the promissory note of the purchaser. Then the finance company takes the place of the dealer. The purchaser makes his payments to the finance company, and when the purchaser pays up, he gets his bill of sale, and the finance company surrenders his notes and surrenders the conditional sales contract.

[fol. 44] Now that, briefly, is the manner in which the automobile business is conducted in all large cities, and in the smaller towns as well. It is a general custom now, you might say, whereby automobiles are sold on installment payments.

Now when a finance company buys automobile paper, it has to be assured of several things. First of all, it wants to know that the purchaser is financially responsible, financially able to pay. Obviously, neither an automobile dealer nor a finance company wants to take a note or a contract payable in installments from somebody who is a poor financial risk, either because he has nothing to pay with, or because he is a bad moral risk; so that is the first thing they want to know.

The second thing they want to know, of course, is that there was a genuine sale, and that they are buying the notes and contract of a genuine purchaser. In other words, they want to know the fact that a real sale took place.

Next, they want to know the identity of the purchaser, and that he is a real person, and further, they want to know that he is financially responsible so that he will pay up. Otherwise they would not stay in business very long.

The finance company, of course, gets the same security that the dealer has, and just as a dealer, if he is doing business legitimately, has to know those things, whether the purchaser is any good or not, the finance company has to know the same things. Otherwise they would not buy the paper; or if they did, they would not stay in business very [fol. 45] long.

Now as a practical matter, a finance company in Minneapolis, let us say, buying automobile paper from a dealer in the southern part of the state, cannot and does not send a detective out in each case, to check up and see whether the purchaser is a real man, whether the sale was a genuine sale; that is, whether the purchaser really has possession of the car, and has bought it, and has received it, and whether he is financially reliable. The expense and the time consumed in having an expedition in each case, would make the financing business impossible as a practical matter. Therefore, all the finance companies, I think I can safely

say, have a customary way of protecting themselves, and they do it in this way.

When a dealer comes to them—let us say that Mr. Jones of Waseka comes and says, "I have five cars I have sold. I got a down payment on each one. The purchaser has the car and he is good. I want to sell those five [contract] to you," the finance company does this; first they insist on a written statement from the purchaser—a purchaser's statement, showing where the man's residence is, what his occupation is, and so on—a brief history of the same sort that you would give if you applied to a furniture store for credit. They also ask for the names of references to whom application can be made to determine whether the man is financially reliable or not.

[fol. 46] The finance company may ask for the purchaser's statement before it buys the paper. If it were an isolated transaction, a single transaction with a dealer, it would do that. If a finance company, however, is in the habit of buying paper regularly from dealers, normally the company would pay the dealer for the contract and then send out a request for credit information. At whichever time it does it, the finance company then sends out credit inquiries to the people who are listed on the purchaser's statement, with the more or less routing kind of inquiry that you are familiar with, "Does so-and-so do business at your store? Does he pay his bills promptly? Is he good? Does he owe bills all over town?" and so on. If it gets satisfactory answers, normally it is assured of the fact that the purchaser is all right. Then, to make sure, the finance company may send the little contract book to the purchaser through the mail. Let us say that Mr. Jones at Waseca says that he sold one car to a Mr. Anderson on Rural Route Number 1. The finance company then sends a copy of the contract book to him, showing the amount of the purchase, and when the payments fall due, and they send it through the mail to him. Then as the payments fall due, if they are not made promptly, the company sends notices to the purchaser, Mr. Anderson, calling his attention to the fact that the payments fall due; and ordinarily they will send him a second notice, and a summary notice, and a final notice; and in that way, through the mail, the

[fol. 47] finance company as a matter of routine, is able perfectly to keep in touch with the purchaser.

Now, obviously, if Mr. Jones of Waseca did not sell a car to Mr. Anderson, when the contract book is sent to him from Minneapolis, if he has not bought a car it will not take him long to tell the company that he is not the purchaser of the car; so in that way, as a matter of routine, the finance company is able, first of all, to investigate the credit risk; second, to get in touch with the purchasers and keep in touch with the purchasers.

I do not want to take any more time on that now, because those are things about which you are probably well advised. Now to get down to the facts in this case; there was a man by the name of Thomas Hunting, who is no longer living. He was an automobile dealer in Montgomery, Minnesota. I believe he sold Fords and Plymouths. He had been established for some years, and operated his business in the usual fashion with which you are all, at least in some measure, acquainted. The Midland Loan Finance Company of this city which we represent, was in 1933 and has been ever since, in the business of buying automobile paper in the manner which I have described. In some way, which it is not necessary now to relate, Mr. Hunting got in touch with the Midland Loan Finance Company, with the view to selling them these contracts on cars that he had sold in and around Montgomery, in the town of Montgomery and in the rural communities that are tributary to Montgomery; and starting [fol. 48] in February, 1933, he sold notes and contracts—what we ordinarily call automobile paper—to the plaintiff company in Minneapolis. That paper turned out to be perfectly satisfactory. Payments were made to the Midland Loan Finance Company on time, and the paper all worked itself out in perfectly proper fashion. They continued to do business on a slightly larger scale, through 1933 somewhat sporadically, and then in 1934 until their volume of business became rather large, and the Midland Loan Finance Company was financing Hunting to a considerable extent.

In order to protect themselves in the manner I have described, they followed the customary procedure I outlined.

either before or about the time when they purchased the contract—originally before they purchased the contract and later on, as they became more accustomed to Mr. Hunting, I believe after they gave Hunting the check—they would send out letters of inquiry to the credit references given in the purchaser's statement, and send a copy of the contract book to the purchaser. If he failed to make any payment, they sent him a notice. In this way, through the mails, they kept in touch with the purchasers.

Everything was perfectly satisfactory until April or May, 1935. At or about that time, the young lady in the Midland Loan Finance Company's office who sits back [fol. 49] there, and who will be a witness in the case, discovered to her astonishment one day, in checking over the separate card records of automobile paper that had been purchased, that they had two contracts in two different names, on the same car. In other words, the conditional sales contract of course gives the motor number and the serial number of the car. Also, their ledger records on each transaction contain that same information. More or less by accident, she happened to notice that they had two cars in two names with the same serial number and the same motor number.

This was called to the plaintiff's attention, and they made an investigation. They had a conference with Mr. Hunting, which led to nothing in particular. Then getting suspicious as to whether or not there might be something wrong, they made a further investigation through the Secretary of State's office, and discovered again, to their amazement, that of the unpaid contracts which they had purchased and still held on their books, practically all of them were fictitious sales. Out of some 82 contracts which were still left unpaid, I believe the testimony will show that 75 were not with existing people; in other words, those contracts signed by those purported people were forgeries, the names were fictitious, the credit statements were fictitious, and so on; and on the balance of the con- [fol. 50] tracts, where they were real people, the people had never purchased the car from Mr. Hunting; or if they had purchased a car, it was not the car that was transferred to the plaintiff as security on the contract.

It was a complete mystery to the plaintiff as to how this fraud could have been perpetrated on them. A representative of the company went to Montgomery to confront Hunting. Hunting confessed, and in Hunting's garage, in a desk, were found all or substantially all of the duplicate contract books mailed to the purchasers. Perhaps I should not say all, but a large number of the contract books which the plaintiff had sent to the purchasers through the mails, were found in his garage. There was also a large amount of other mail matter which had been sent from Minneapolis through the United States mails to the various purchasers. Unable to understand how that mail had turned up in Hunting's office, or in Hunting's possession, they made inquiries at the post office, and, confronted with this situation, the Postmaster admitted to the plaintiff that he had made a practice at Hunting's request, during the years 1933 and 1934 and up until that date in 1935, of delivering to Hunting's box, every piece of mail matter that came to Montgomery in an envelope bearing the name of the Midland Loan Finance Company. All mail that came to Montgomery, Minnesota, from Minneapolis, in an envelope of the Midland Loan Finance Com-
[fol. 51] pany, whether it was addressed to John Jones or John Anderson, or whoever you might chose, whether in Montgomery or in the rural delivery section, was put into Hunting's box; so that for a period of two and a half years, or so, the plaintiff had been laboring under the apprehension that the United States mails were being delivered to the people to whom it was addressed, whereas in fact all of this mail matter went to Hunting. It was all delivered to him; it all went into his box, and he was thereby enabled to fill out the credit reports as though they came from the Pure Oil Company, or the bank or from John Jones, the baker, and turn in perfectly good reports. He also received all the contract books.

Consequently the Midland Loan Finance Company never got in touch with any of the real people who had bought cars, and never learned that most of the people were fictitious people, to whom of course the mail could never have gone, and which mail, under the postal regulations, should have been returned to the Midland Loan Finance Company.

Obviously, I do not have to labor that point. If the Midland Loan Finance Company had known that any of those people were fictitious, it would not have done business with Hunting. If any of the letters had come back because of failure of delivery, the Midland Loan Finance Company would have been put on its guard, and have had an opportunity to stop the fraud, and were deprived of that by this course of conduct.

[fol. 52] Those postal regulations require the Postmaster to deliver the mail to the addressees named, unless he has a written authorization from the addressee, or the person named on the envelope, to deliver it to somebody else; and we claim and I think we shall show that the practice of Mr. Malone as Postmaster, to deliver the mail to Hunting, was, whether innocently or corruptly it matters not, in violation of the postal laws and regulations, and was the direct cause of the chain of circumstances that led to the defrauding of the plaintiff.

Mr. Malone was appointed acting postmaster sometime in 1934. He subsequently was made regular postmaster, but I do not think that concerns us. I think that during the entire period involved here, he was acting under an acting postmaster's commission. Under the laws of the United States, a postmaster is required to file a bond, written by an authorized surety company or by sureties satisfactory to the government, whereby he and his sureties bind themselves, and contract faithfully to perform the requirements of the postal laws and regulations, in substance, and by which they are made legally responsible for any damages resulting from a violation of the postal regulations.

Having discovered with reference to some $40,000.00 worth of accounts, first of all, that they were fictitious or otherwise worthless, that no recovery could be made upon them, that the plaintiff had nothing whatever out of which [fol. 53] to satisfy its claim, and having discovered as I have pointed out, that Hunting was enabled to and did perpetrate this fraud solely through the connivance of the postmaster, the plaintiff has made claim upon his bond, and is now suing on it. We claim that the damage which the Midland Loan Finance Company has sustained is the

direct consequence of Mr. Malone's misconduct in office, in failing to abide by or perform his duties under the postal laws and regulations.

Now with the items of the claim, as to how the amounts of the plaintiff's damages are computed, it is not necessary for me to go into that now. We have in court a considerable portion of the books and records of the plaintiff company, which will be introduced. Mr. Hunting is no longer alive, and it is no longer possible to have his testimony, but we shall endeavor, as quickly as possible, to present to you just how these transactions were undertaken, just what happened from time to time, what the custom of the finance company is, and I think we will demonstrate to you that the direct and immediate cause of the loss for which we are suing was the breach of the bond, and so we are asking for a verdict and judgment, both against Mr. Malone and against his surety company, the National Surety Corporation, on the bond.

Mr. Butler: May I ask a question, Mr. Deinard? Do I understand that the plaintiff does not intend to prove [fol. 54] corrupt motives on the part of Mr. Malone? I was not quite clear, from your opening statement, and I wish to know whether I am to take it that the plaintiff intends to prove or does not intend to prove corrupt motives on the part of the defendant Malone, in participation with Hunting, in the scheme to defraud?

Mr. Deinard: Well, I have no objection to stating for Mr. Butler's information, that as I have said, I think it is quite immaterial, and not being privy to the secrets of Mr. Malone's soul, I don't know. However, I intend to ask him.

Mr. Butler: I am not assuming for a moment that it is privy to any secrets, and that isn't my question. I am asking whether or not I am to understand from your opening statement to the Court of what you intend to prove—whether the Court and Jury are to understand that you do not intend to prove corrupt motives on the part of Mr. Malone as averred in your complaint, and that is all I am asking. I have a right to know. I have an issue tendered me by the complaint, and I want to know whether it will be proven.

Mr. Deinard: I would like to oblige Mr. Butler, but I don't think I can commit myself any further than I have.

[fol. 55] Mr. Butler: If your Honor, please, at the conclusion yesterday afternoon, in order to make certain that the plaintiff had in mind pressing what he stated he intended to prove, I directed a question to him as to whether he intended to prove that this Postmaster here, in acting as it is claimed that he did, acted from corrupt motives in participating with Hunting in an effort to defraud the plaintiff, or whether it is the plaintiff's claim that the Postmaster was without corrupt motives, careless or negligent merely in the performance of whatever the regulations might require. To that query the defendant received no direct answer. Your Honor will readily appreciate that it makes a difference in the defense of the case whether one is called upon to defend an action sounding in deceit or fraud, or one of negligence. The complaint sets forth one of those forms. The tender of proof to the Court suggests that another type of action will be presented. I wish, with your Honor's permission, to inquire whether this second type or whether the complaint relied upon will be proved. I think it is a fair question.

The Court: Well, as I understood Mr. Deinard's statement, he said he did not think it made any difference whether his actions were prompted by a corrupt motive or by mere careless actions. I am not in a position to have counsel amplify their opening statements. I assume they stand on their pleadings.

[fol. 56] Mr. Deinard: Well, I say, your Honor, it is not because I have any intention not to give counsel as categorical an answer as I can, but I don't know what Mr. Butler means by the use of the word 'Corruption'. So far as I am informed, now, without going through every word of the complaint, the word is not used in the complaint in connection with the defendant Malone."

At the close of the opening statement and before plaintiff offered any testimony, defendant National Surety Cor-

poration moved the court to direct a verdict in favor of defendant National Surety Corporation and against plaintiff, as follows:

(Motion of Defendant, National Surety Corporation, for Directed Verdict.)

Mr. Butler: "On the pleadings and on the opening statement of counsel, the defendant National Surety Company moves that a verdict be directed in its favor.

The Court: Motion denied and exception allowed.

Mr. Butler: I should like to state the grounds for the motion. The first ground is that the tender of proof presented to the Court presents a fatal variance between the complaint and the proof offered. That has been settled by the cases. The second ground, for the motion, is that upon the pleadings and upon the tender of proof just made by the plaintiff, no consent of the United States to the bringing of this action appears. The third ground of the motion [fol. 57] is that the regulations, the violations of which are made, in the opening statement, the basis of the action and said to be the sole cause of the damages, first, do not permit this action upon the bond; second, do not require delivery of mail as suggested by the plaintiff, and third, provides for exclusive remedy through the Postal Department for damages to persons or property in the charge of any employee of the Postal Department. Second, it appears from the opening statement that during all the time in question this man was acting Postmaster. The liability of an acting postmaster is under the regulations, merely the safe custody of government property, and no more, and the bond on which the suit is brought covers no more than the safe custody of the property of the government in the post office. The next ground of the motion is that it appears from the opening statement and from the pleadings that the damage complained of is not a consequence of any violation of any duty owed by this defendant Malone to this plantiff, but is due to the independent act of another person, an independent and possibly criminal act of another person, Hunting, now deceased.

[fol. 58] At said time defendant Patrick J. Malone also moved the court to direct a verdict in his favor and against plaintiff as follows:

Mr. Havel: "The defendant Malone joins in the motion just made.

(Arguments of counsel.)

(Jury excused from the court room during arguments of counsel.)

The Court: I will deny the motion on the grounds indicated.

Mr. Butler: Exception, please.

Mr. Havel: Exception on the part of the defendant Malone.

The Court: Have you any further matters you want to present on this motion?

Mr. Butler: Yes, I have, your Honor.

(Arguments of counsel.)

The Court: The ruling of the Court is that the motion is denied and exception allowed to both defendants."

Before any testimony was taken, defendants National Surety Corporation and Patrick J. Malone asked leave of the court to amend their answers as follows:

Mr. Sullivan: "At this time we would like to move to amend the answer of the defendant National Surety Corporation, such amendment to be as follows: to insert at the end of paragraph 4 of the present answer of the defendant, the following: This defendant hereby refers to [fol. 59] and incorporates herein by this reference, with the same force and effect as though set forth at length herein, the following duly promulgated postal laws and regulations of the United States; edition of 1932, sections 10, 415, 416, 443, 473, 777, 815, 816, 1323 and 1367, and amendments to said postal laws and regulations made by the orders of the Postmaster General of the United States as fol-

lows: Order number 3349 promulgated March 21st, 1933; order number 4579, insert number 45, promulgated November 27, 1933; order number 4579, insert number 52, promulgated November 27, 1933; order number 4620 promulgated December 6, 1933; order number 5275 promulgated April 10, 1934, and order number 5736 promulgated June 29, 1934." In that connection, the reason we are listing these particular sections of the postal regulations is this: the plaintiff has set forth in the complaint a considerable number of them, and while the law undoubtedly says that the Court will take judicial notice of the postal laws and regulations, under the authority of Cashe vs. United States, 1904, 152 U. S. 211, there are such a large number of them that we thought it advisable to specify with some particularity which sections of the postal laws and regulations and amendments thereto we thought had a pertinent bearing on the issues that most likely would be raised in this case, and it was with that in mind that we thought we had better point out with an amendment those particular sec-
[fol. 60] tions of the postal laws rather than just merely rely on the rule of judicial notice of the postal laws and regulations.

(Arguments of counsel)

The Court: Are there any objections to the motion?

Mr. Deinard: We join in the position that the Court takes judicial notice of the laws and regulations. We set them up in the complaint because they are difficult to get ahold of, and we thought it would make the complaint more intelligible. I take it the Court is not passing on the relevancy of any of them now.

The Court: No.

Mr. Deinard: Outside of that there is no objection.

Mr. Havel: I want to join in the motion on behalf of the defendant Malone, and in addition I would like to amend the answer further to include this further allegation: "the defendant further alleges that this action was commenced without the consent or authority of the United States or its Postmaster General or Postal Department, and that no consent to the prosecution and maintenance of

the action by the United States or the Postmaster General or the Postal Department has ever been granted." The surety company has alleged that in their answer, and I inadvertently neglected to put it in my answer. I would like to include or assert that defense also in behalf of the defendant Malone.

[fol. 61] Mr. Deinard: That is objected to as irrelevant because that is in the bonding company's answer, and we are going to move to strike it.

The Court: I will allow you to make such motion as will bring the question of its relevancy to the Court's attention. Both amendments may be allowed.

Mr. Deinard: I assume that since the Court takes judicial notice of them, we can supplement our pleadings or our proof with any of those amendments after we have identified them.

Mr. Butler: Surely.

The Court: Apparently that is recognized by all parties."

Thereupon, plaintiff moved the court to strike from the answer of defendant National Surety Corporation certain portions thereof as follows:

Mr. Deinard: "At this time the plaintiff moves to strike from the answer of the defendant National Surety Corporation that portion of paragraph 2 contained in the second section as follows: 'Expressly denies that said bond was for the use, benefit and protection of all persons lawfully using the United States mails, at, to, and from Montgomery, Minnesota, including plaintiffs, and on the contrary alleges that said bond was for the use, benefit and [fol. 62] protection of the United States of America only," on the ground that the same is irrelevant and does not state any defense or any defensive matter. Separately the plaintiff moves to strike that portion of the answer of the defendant National Surety Corporation contained in the first section of Paragraph 4, before the amendment proffered today, as follows: 'Alleges that this action was commenced without the consent or authority of the United

States or of its Postmaster General or Postal Department, and that no consent to the prosecution or maintenance of the action by the United States or the Postmaster General or Postal Department has ever been granted' on the ground that the same is irrelevant and does not state a defense or any defensive matter. Separately the plaintiff moves to strike from the separate answer of the defendant Patrick J. Malone the new matter offered as an amendment this afternoon, and all thereof, on the ground that the same is irrelevant and does not state any defense, or any defensive matter.

(Arguments of counsel)

The Court: I do not think we need to spend a great deal of time over this matter now. I suppose that Judge Joyce's decision must be taken as an indication, on the complaint, to the effect that it states the cause of action, and in that the right of the plaintiff to proceed against this bonding company on this bond was not a question of fact at all [fol. 63] but purely a question of law, and it seems to me that it must be conceded that Judge Joyce apparently was of the opinion that the plaintiff had a right to proceed against the surety company on this bond. What significance he attached to the letter that was presumed to be sent by the plaintiff to the Attorney General I don't know, but it is quite probable that he considered this feature, that is, that the United States might have a prior claim, or might in some way indicate that it should have preference on a recovery on this bond, and without any such indication to the plaintiff it was fair to assume that the United States had no claim, and therefore the plaintiff could proceed to recover on this bond. Now then, whether I would be required to follow Judge Joyce's ruling on that matter, I am not in a position to state. I assume generally that where one judge has ruled on a matter, that I should not be required to go over the same ground and consider the same matter that was submitted to that Court, and in the absence of exceptional circumstances, I assume I should consider that a closed question. I see no particular reason for ruling on the motions now, because after all they give rise to questions of law, and any facts that they will involve are of no great burden to either side in the preparation of the case or the defense. Now I assume that the defendants

will finally protect their record in some manner on that question, requiring me to rule, and then I will be required to rule, and that will end the matter. I do not know [fol. 64] whether it makes much difference whether I grant the motions on the theory that they do not now constitute a defense, because of Judge Joyce's ruling. That is the only ground you have for your motion. I would prefer to defer my ruling until I have acquired more information about it. I just looked at the the file before noon, and I read Judge Joyce's order. I have not read the United States case to which he refers, and I take it it will be some time before that question will come before me. At least I can defer it. My view at this time at least would be that in the absence of exceptional circumstances I should follow Judge Joyce's ruling in the matter, I have no reason to doubt that he gave it his usual careful consideration, and as to that phase of the demurrer regarding the right of the plaintiff to proceed as against this bond, if Judge Joyce did not believe that the plaintiff had a right to proceed against the bond, the demurrer should have been sustained. Often where difficulties arise, a Judge may feel that the trial court would be better equipped to rule on it, than the court to which a demurrer is submitted, but that is a question of law. If the plaintiff has no right to proceed against this bond, the demurrer should have been sustained. Therefore I will defer my ruling on the motions. I do not see that either side will be prejudiced by so doing, and I assume that the question in another way will be presented to the Court, so that I will have to rule eventually on it.

(Arguments of counsel)

[fol. 65] The Court: I might say that Mr. Heisey sent [work] to the Clerk that he would not participate in the trial, but that he would file a brief.

The Clerk: That he would make no appearance, but that he would file a brief.

(Arguments of counsel)

The Court: Well, if and when the United States indicates its views, I of course will have to consider the existence or non-existence of exceptional circumstances."

As stated by Honorable Gunnar H. Nordbye in his Order and Memorandum of May 16, 1938:

"The only indication that the Court has received as to the Government's position in the matter is a [biref] filed during the trial by the United States Attorney of this district as amicus curiae in support of the defendant surety company's position that the plaintiff has no right to bring this action on this bond."

Thereupon plaintiff, to sustain the issues upon its part and in support of the allegations contained in its complaint, offered the testimony of the following witnesses as its evidence in chief:

Herman Schlieff
Blanche Glaunert
Kenneth L. Bjornson
Robert D. Murphy
Elling A. Knutson, Secretary of State
Jerome J. Menth
Kleve J. Flakne
Abraham M. Calmenson
Milton D. Bentley

[fol. 66] None of these witnesses gave any testimony bearing on the right of plaintiff to maintain this action against defendants on defendant Patrick J. Malone's acting postmaster's bond without the express consent or permission of the United States of America to sue thereon, and therefore, the testimony of these witnesses is not set forth.

At the close of plaintiff's case in chief, counsel for defendant National Surety Corporation made a motion for directed verdict on the following grounds:

Mr. Butler: "The defendant National Surety Company asks leave to rest for the purpose of making a motion for a directed verdict with the reservation or understanding that if that motion be denied, we will have the right to reopen the case.

The Court: It may be so understood.

Mr. Butler: The defendant National Surety Company moves the Court to instruct the jury to return a verdict in its favor and against the plaintiff for that the evidence shows no causal relationship between the act of Malone, whatever it may be, and any damage suffered by the plaintiff, and for that there is no proof that Malone was responsible for the misplacement of any mail into Hunting's box, and with reference to a government post office employee the rule of respondeat superior does not apply, nor do the rules fixing responsibility upon a master for an act of a servant or employee. The only proof in that [fol. 67] respect is—

The Court: Wouldn't it be simpler for you to dictate your motion and then complete it, instead of arguing it? Then I will hear your argument.

Mr. Butler: Very good; and for that plaintiff has proved no damage attributable to the defendant Malone, for that the evidence negatives any misconduct, carelessness, neglect or violation of rules by the defendant Malone, and for that the evidence negatives any reliance or dependence upon the delivery of the mails here in question by the plaintiff in the conduct of its business insofar as the defendant Malone is concerned. The motion is also based on the ground that there is no evidence of any consent of the United States, of any officer, department or other representative thereof, to the bringing of this suit.

Mr. Sullivan: And on the further ground that on the evidence in this case there is no showing that the defendant Malone ever misdelivered any mail addressed to any of the persons covered by the exhibits A-3 to A-35 here inclusive."

At said time counsel for defendant Patrick J. Malone also made a motion for directed verdict on the following grounds:

Mr. Havel: "As attorney for the defendant Malone, reserving the right to reopen if the motion is not granted, I will also make a similar motion on the same grounds.

[fol. 68] The Court: Yes, it may be so understood.

* * * * * * * *

The Court: I will deny the motions at this time without prejudice to the renewal thereof at the close of all the testimony, and exception may be allowed to the defendants. The Court will also deny the motion to strike the testimony given by the witness Schlieff wherein he repeated alleged admissions by Malone, and an exception may be allowed to the defendants."

Thereupon defendants, to sustain the issues on their part, offered the testimony of the following witnesses as their evidence in chief:

Frank A. Barta
Ed Borak
William M. Kozel
Ed Holicky
George Redke
Mike Bendzick
M. I. Ryan
James G. Zelenka
J. L. Dvorak
J. J. Petricka
Frank Dietrich
Charles J. Bank
Mike Staetgens
Louis R. Whitesides
Joseph Wieland
Maurice A. Hessian
Herman Moll
Dan Day
A. Saxton
Henry E. Randall
Frank F. Ambrose

None of these witnesses gave any testimony bearing on the right of plaintiff to maintain this action against defendants on defendant Patrick J. Malone's acting post-[fol. 69] master's bond without the express consent or permission of the United States of America to sue thereon, and therefore, the testimony of these witnesses is not set forth.

After the close of defendants' testimony, plaintiff offered rebuttal testimony, none of which relates to the question of plaintiff's right to sue on said bond.

As part of defendants' case, the following statement was made by Mr. Benedict Deinard, one of the attorneys for plaintiff, with respect to the consent of the United States given for the commencement and maintenance of this action on defendant Patrick J. Malone's acting postmaster's bond.

The Court: "Anything further, Mr. Butler:

Mr. Butler: There is the matter that Mr. Deinard suggested that we take up with your Honor, that we would like to present.

The Court: Yes, we will take our recess at this time. The jury may be excused subject to call. He will take a few minutes recess.

(Jury leaves the court room)

(The following proceedings took place without the presence of the jury)

Mr. Deinard: Do you want me to take the stand?

Mr. Butler: I understand the situation is this; with respect to the consent of the Government to this suit, there is a stipulation that the United States has not consented to be sued. I ask, in order to enforce and dramatize the situa-
[fol. 70] tion that there be a stipulation that consent was requested and refused. Mr. Deinard has not so stipulated. I may state to the Court that there was some correspondence between Mr. Sullivan of our office and Mr. Deinard, in which Mr. Sullivan asked that any documents that they had with reference to obtaining that consent, be brought here. I am not fully familiar with the correspondence, but I think something was said about it being taken without objection to the foundation, but with Mr. Deinard's objection as to materiality. There is no need for him to take the stand if he will indicate from his files what was done to obtain consent, and what was done by the Government with respect to it.

Mr. Deinard: As a matter of fact, I want to remind Mr. Butler that the arrangement was this; in my letter to Mr. Sullivan of October 5th I said that we would produce if relevant and material, the correspondence between our office and the Washington, D. C. officials, relative to our request to institute suit, on the understanding, however, that you would likewise produce the correspondence between the National Surety Corporation and the same officials relative to the request of the National Surety Corporation for leave to defend in the name of the United States. I am not asking for that yet, but I will—

[fol. 71] Mr. Sullivan: There is no such correspondence that I know of.

Mr. Deinard: I know you don't know of it if you say so, but it is there nevertheless.

The Court: Do you intend to make up the record by statements of counsel?

Mr. Deinard: No. The bond in this case, the photostatic copy of the bond was procured from the Post Office Department. I take it you don't care about the date.

The Court: This is not for the record, Mr. Reporter.

(Statements of Court and counsel off the record.)

Mr. Butler: My understanding was that consent was asked of the Government, and that it was refused.

The Court: Do you mean by Mr. Deinard?

Mr. Butler: Well, by somebody in behalf of the Midland Loan Finance Company. I suppose somebody went to Washington about it.

Mr. Deinard: Oh no, you are wrong on that.

The Court: This is not for the record.

(Statements of Court and counsel off the record)

Mr. Deinard: In a letter from the Department of Justice dated September 22, 1936, it was stated: 'This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as

stated by you, the claim is the exclusive property of your [fol. 72] client and can be asserted only by your client. The bond of the Acting Postmaster was executed in accordance with the provisions of R. S. 3834 as amended, USC, Title 39, Section 34. Whether the sureties on a bond executed in accordance with the provisions of this section are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General.' Then later a copy of the order overruling this demurrer was sent to the Solicitor of the Post Office. That is all my dealings with them, Mr. Butler.

Mr. Butler: Is there anything in that letter relative to the Attorney General consenting to bringing suit in the name of the United States, or refusing to give the plaintiff permission to do so, or anything else in the files?

Mr. Deinard: Well, in this same letter he says: 'In these circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it'.

Mr. Butler: Prior to that has there been a request for permission to sue on the bond?

Mr. Deinard: Yes.

Mr. Butler: In the name of the United States?

Mr. Deinard: Well, before I say 'yes'—just a minute—

[fol. 73] Mr. Butler: The general question is a perfectly easy one to answer without going on the stand.

Mr. Deinard: I want to be sure of this. It is over a year ago. Yes—in my letter of July 15th, 1936, request was made of the Attorney General for authorization to commence the suit.

Mr. Butler: What was his response?

Mr. Deinard: The response I have already read to you.

Mr. Butler: Have you read all of it?

Mr. Deinard: I have read the portion of it which has to do with this question.

Mr. Butler: Is there anything relating—

Mr. Deinard: I read the portion of it relating to the consent of the United States, to our request.

Mr. Butler: Is that the only answer you ever got to your request, what you read?

Mr. Deinard: Just a minute. We have had no correspondence with a Government office with respect to the matter of consent since that letter. Since that letter I have had a personal conference with the Solicitor of the Post Office Department, but no correspondence.

Mr. Butler: That portion of that letter that you read into the record is the only response you have ever received?

[fol. 74] Mr. Deinard: Yes.

Mr. Butler: With respect to the query you addressed to the Attorney General?

Mr. Deinard: Yes.

Mr. Butler: All right. Did you verbally ask leave of the Solicitor, for permission to sue on this bond?

Mr. Deinard: No, sir. At my last conference with the Solicitor, I discussed with him at some length the decision of Judge Joyce in this case. He asked me to send him a copy of the order and I sent him the order. We made no request.

Mr. Butler: So that now we have the whole story of the Midland Loan Finance Company's attempt to get the consent of the United States, and the answers of the officers of the Government with respect to that?

Mr. Deinard: Yes, sir.

Mr. Butler: Is that correct?

Mr. Deinard: Yes, sir.

The Court: Is there anything further?

Mr. Butler: I have nothing further on that. I am perfectly willing to accept his statement on that, of that fact, without the necessity of his taking the witness stand."

[fol. 75] At the conclusion of all of the testimony defendant National Surety Corporation again renewed its motion for directed verdict in its favor and against plaintiff upon the following grounds:

The Court: "All right, gentlemen, you may proceed. Have you any motions?"

(The jury was thereupon excused and left the courtroom prior to the making of the motion).

Mr. Butler: Upon the understanding that in case this motion shall be denied, and that even though the plaintiff should make a motion for a directed verdict, that nevertheless the defendants will be permitted to go to the jury, the defendant moves for a directed verdict.

The Court: It may be so understood.

Mr. Butler: The defendant first moves that the case be dismissed for that the plaintiff is without right to sue on this bond. In case that shall be denied, the defendant moves that the cause be dismissed because even though plaintiff has a right to sue on the bond, it has no such right without the consent of the United States, which was not given. If that motion to dismiss is denied, I will submit the motion to the Court on the record already made in the case, on the files and records, and the files at the time of the demurrer and subsequent to it. The defendant National Surety Company also moves to dismiss the action for that the action is not within the jurisdiction of the District Courts of the United States. Does your Honor wish me to go on through with the motions, or shall I just discuss them now as I go along?

The Court: Well, may I suggest that you first make your motions, so that they may be completed?

[fol. 76] Mr. Butler: Very well. The defendant moves that the jury be instructed to return a verdict in its favor, and against the plaintiff, for that it appears from the evidence that the loss, if any, suffered by the plaintiff was not

due to or proximately caused by any act or omission of the defendant Malone, nor that such damage, if any, was not within the reasonable contemplation of the parties to the bond at the time of the execution thereof. The defendant also moves for a directed verdict in its favor and against the plaintiff on the ground that there is no evidence that the plaintiff is advancing money to Hunting, acted upon, in any measure or degree, the mails, their transmission or the custom of handling, or the regulations in respect thereto. Defendant moves for a verdict directed in its favor and against the plaintiff for that there is no showing of any breach of the defendant Malone of any regulation of the Post Office Department, of any law, or of any condition of his bond, and for that the acts of Malone sued upon are acts by law and postal regulation committed at the discretion and judgment of Malone, and there is no showing that any act done by Malone was not within the free and bona fide exercise of his judgment and discretion. Defendant further moves that a verdict be directed in its favor and against the plaintiff for that there is a variance between the pleadings and the proof of the plaintiff, the pleading being an attempt to state a cause of action based upon a willful wrong of the defendant Malone, alleging conspiracy [fol. 77] and participation with Hunting in Hunting's crimes, the proof being at most, if at all, of carelessness on the part of Malone. The defendant further moves that a verdict be directed in its favor and against the plaintiff for that there is no showing made upon which the defendant Malone can be charged for any wrongful act, or any act of the postal clerk Zelenka, and for that it appears that Malone was at all times an officer of the Government in the discharge of a Governmental function in relation to matters committed to his performance in the exercise of his discretion."

At the conclusion of the testimony defendant Patrick J. Malone also again renewed his motion for directed verdict in his favor and against plaintiff upon the following grounds:

(The jury was thereupon excused and left the courtroom prior to the making of the motion.)

Mr. Havel: "I would like to have the record show that the defendant Malone moves, and makes the same motions that were made by the defendant Surety Company, and in addition thereto moves further that a verdict be directed in favor of the defendant Malone on the question of proximate cause, for this reason, that the unlawful acts of Hunting intervened, which could not reasonably have been foreseen by Malone. Further, defendant Malone at this time makes a motion to strike from the complaint, all allegations charging him with any conspiracy or wrongdoing on his part, on the ground that there is no proof here to show [fol. 78] a culpable motive on the part of Malone, or any intentional wrong by him.

Mr. Butler: If your Honor please, may I add to the first motion for dismissal another alternative motion at this time, and that is, if that motion be denied, that the action be dismissed for the reason that the embodiment of the obligations of the bond is that provided in the Postal Regulations and notably that of Section 816 thereof.

The Court: Surely.

The Court: The motions for directed verdicts made by the defendants National Surety Corporation and Malone will be denied, and an exception will be allowed to such defendants. The ruling on the defendant Surety Company's motion to dismiss will be reserved."

Plaintiff stated in open court that it limited the amount of its claim aganst defendant Patrick J. Malone to the amount of the bond, i. e. $16,000.

Thereafter, counsel for plaintiff and defendants presented their arguments to the jury, and the court thereupon charged the jury.

Thereafter, and on October 29, 1937, the jury returned a verdict in favor of plaintiff and against defendants, and each of them, in the amount of $16,000. On said date, judgment was entered in favor of plaintiff and against defendants in said amount.

Thereafter, and on or about November 10, 1937, defendant National Surety Corporation moved the court for an

order dismissing plaintiff's complaint on the merits, on the following grounds:

(Motion of Defendant, National Surety Corporation, to Dismiss Complaint.)

"1. That plaintiff has no right to bring this action; that this defendant is and was under no liability or obligation to plaintiff either under the official bond of the defendant Malone as Acting Postmaster at Montgomery, Minnesota, or otherwise; that the sole party in interest [fol. 79] who may sue on or recover under said official bond is the United States of America.

2. That plaintiff has failed to show any authority, permission or consent from the United States of America to institute or maintain this action on said official bond.

3. That no authority, permission or consent was obtained by plaintiff from the United States of America to institute or maintain any action on said official bond.

4. That the United States of America declined to give plaintiff authority, permission or consent to institute or maintain this action on said official bond.

5. That the court is without jurisdiction to entertain this suit, which is one between plaintiff, a citizen and resident of the State of Minnesota, against defendant Malone, a citizen and resident of the State of Minnesota, and this defendant, a citizen and resident of the State of New York, wherein no separable controversy exists between the said defendants and plaintiff.

6. That the court is without jurisdiction to entertain this suit in that it is not one arising under the Postal Laws of the United States of America.

7. That the Postal Regulations of the United States of America, edition of 1932, particularly section 816 thereof, provides the sole, exclusive, and only method of recovery on the bond here involved, and that none of the matters [fol. 80] and things required by said Regulations to be done and performed as a prerequisite to an action on said bond has been done or performed, either by plaintiff or otherwise.

8. That the trial court, prior to the submission of the case to the jury and without prejudice to the rights of this defendant by reason of such submission, reserved for decision by the court certain questions of law properly raised by motions of this defendant, and a determination of the questions so reserved, if favorable to this defendant, requires a dismissal of this action on the merits as to this defendant."

Thereafter, and on or about November 17, 1937, defendant Patrick J. Malone moved the court for an order dismissing plaintiff's complaint on the merits, on the following grounds:

(Motion of Defendant, Patrick J. Malone, to Dismiss Complaint.)

"1. That plainitff has no right to bring this action either in the name of the United Statees of America or otherwise, in that this defendant at the times referred to in the complaint herein was under no liability or obligation to plaintiff either under this defendant's official bond as Acting Postmaster at Montgomery, Minnesota, or otherwise, and for the further reason that the United States of America is the only party in interest who may sue on or recover under the official bond of this defendant as such Acting Postmaster when and if a breach of said bond occurs.

[fol. 81] 2. That although plaintiff applied for authority, permission or consent of the United States of America to institute and maintain this action on the official bond of this defendant, the United States of America declined plaintiff's request, and in truth and in fact plaintiff is without authority, permission, or consent to institute or maintain this action on said official bond either in the name of the United States of America or otherwise.

3. That the court is without jurisdiction to entertain this suit for the following reasons:

(a) That this suit is not one arising under the Postal Laws of the United States of America;

(b) That the Postal Regulations of the United States of America, particularly Section 816 thereof, provide the sole, exclusive, and only method of recovery on the bond of this defendant as Acting Postmaster at Montgomery, Minnesota, during the times referred to in the complaint herein, and that none of the matters and things required by said Regulations to be done and performed as a prerequisite to an action on said bond has been done or performed by plaintiff, and that inasmuch as this action is based solely upon the official bond of this defendant as said Acting Postmaster all the pertinent portions of said Postal Regulations of the United States of America are incorporated in said bond with the same force and effect as though fully set forth therein;

[fol. 82] (c) That this action is one in which the diversity of citizenship of the parties plaintiff and defendant is insufficient to ground the jurisdiction of this court, in that no separable controversy exists between plaintiff and either of the defendants herein, and that the action is merely one on the official bond of this defendant as said Acting Postmaster, the essence of which is a mere contract action.

4. That the damages, if any, sustained by plaintiff by reason of the alleged breach of the official bond of this defendant cannot be said to have been within the reasonable contemplation of the parties to said bond at the time it was executed by reason of the alleged breach of said official bond are so remote that they are not recoverable either under said official bond or otherwise.

5. That the trial court, prior to the submission of this case to the jury and without prejudice to the rights of this defendant by reason of such submission, reserved for decision certain questions of law in addition to the foregoing questions specifically set forth, which said reserved questions pursuant to such reservation by the court were to be raised by this motion of defendant, and a determination by the court of such reserved questions, if favorable to this defendant, requires a dismissal of this action on the merits and a vacation of the judgment heretofore entered herein."

[fol. 83] Thereafter, said motions were duly presented and argued before Honorable Gunnar H. Nordbye, and on May 16, 1938, an order was entered granting defendant National Surety Corporation's motion to dismiss plaintiff's cause of action on its merits, which order, and memorandum accompanying the same, is by this reference made a part hereof. Plaintiff duly excepted to said order and all thereof, and exception was allowed to plaintiff by the court.

Thereafter, and on June 11, 1938, said Court, by Honorable Gunnar H. Nordbye, made and entered its supplemental order dismissing said action as to Patrick J. Malone for want of jurisdiction, which supplemental order is by this reference made a part hereof. Plaintiff duly excepted to said supplemental order and all thereof, and exception was allowed to plaintiff by the court.

Thereafter, and on June 14, 1938, judgment was entered in favor of defendant National Surety Corporation and against plaintiff, dismissing the case on the merits, and in favor of defendant Patrick J. Malone and against plaintiff, dismissing plaintiff's complaint for want of jurisdiction.

(Prayer of Plaintiff for Approval of Bill of Exceptions.)

And now, in furtherance of justice and that right may be done, plaintiff tenders and presents on September 19, 1938, within the time allowed by law, the foregoing as its Bill of Exceptions in this case, and prays that the same may be settled and allowed, and signed and sealed by the court and made a part of the record in this case.

LEONARD, STREET, and DEINARD,
Attorneys for Plaintiff,
1036 Andrus Building,
Minneapolis, Minnesota.

[fol. 84] (Stipulation of Counsel Approving Bill of Exceptions.)

It Is Hereby Stipulated by and between plaintiff through its counsel, Messrs. Leonard, Street and Deinard, and de-

fendant National Surety Corporation, a corporation, through its counsel, Messrs. Doherty, Rumble, Butler, Sullivan & Mitchell, and defendant Patrick J. Malone, through his counsel, George T. Havel, Esq., that the hereto attached Bill of Exceptions may be filed, settled and allowed by order of this Court, in connection with plaintiff's appeal to the Circuit Court of Appeals of the Eighth Circuit from the judgment of this court entered on June 14, 1938, in favor of defendant National Surety Corporation and defendant Patrick J. Malone.

Dated this 19th day of September, 1938.

LEONARD, STREET and DEINARD,
Attorneys for Plaintiff.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN and MITCHELL,
Attorneys for Defendant National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Defendant Patrick J. Malone.

[fol. 85] Order Allowing and Settling Bill of Exceptions.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

vs.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

The foregoing Bill of Exceptions having been tendered and presented to me, on September 19, 1938, by Messrs. Leonard, Street, and Deinard, attorneys for plaintiff, within the time allowed by law, and it appearing that said Bill

of Exceptions has been approved by stipulation of the parties hereto filed herein,

Now Therefore, It Is Hereby Ordered and Certified that the foregoing Bill of Exceptions has been examined by me and found conformable to the truth, and contains all the evidence offered on the trial of said cause, objections, rulings, orders, decisions and other proceedings had upon said trial in connection with the issues raised by plaintiff's appeal to the Circuit Court of Appeals of the Eighth Circuit, from the judgment of this court entered on June 14, 1938, in favor of defendant National Surety Corporation and defendant Patrick J. Malone, and that the same is true, complete and properly prepared, and the same is hereby settled, allowed, and approved as the Bill of Exceptions herein, and the same is ordered to be filed and made a part of the record herein.

GUNNAR H. NORDBYE,
Judge of the United States
District Court.

Dated: September 19th, 1938.

[fol. 86] Service of the within Bill of Exceptions is hereby admitted this twelfth day of September, 1938.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Attorneys for Defendant,
National Surety Corporation.

Service of the within Bill of Exceptions is hereby admitted this twelfth day of September, 1938.

GEORGE T. HAVEL,
Attorney for Defendant,
Patrick J. Malone.

Filed September 19, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 88] (Order granting Motion of Defendant, National Surety Corporation, to dismiss, May 16, 1938.)

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681 vs. Law
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

The above-entitled cause was tried before a jury, and, at the close of all the testimony, the defendant National Surety Corporation made a motion to dismiss on the merits on certain specified grounds. The Court reserved and deferred its ruling on the motion, to which procedure no objection was made by either party. The case was submitted to the jury and a verdict was returned in favor of the plaintiff.

[fol. 89] Mr. M. J. Doherty, Mr. Pierce Butler, Jr., and Mr. R. O. Sullivan, of St. Paul, Minnesota (Messrs. Doherty, Rumble, Butler, Sullivan & Mitchell of counsel) appeared as attorneys for the defendant National Surety Corporation;

and

Messrs. Leonard, Street & Deinard, of Minneapolis, Minnesota, appeared as attorneys for the plaintiff.

The action was brought by the plaintiff, Midland Loan Finance Company, in the name of the United States as indicated above, to recover damages against the principal and surety on a postmaster's bond in the penal sum of $16,000.00, given in pursuance of Tit. 39 U. S. C. A. §34. No consent to this suit by the United States has been obtained. The complaint sought to recover the sum of $34,997.03 against the principal and $16,000.00 against the surety. Subsequently, the plaintiff limited its right of recovery against both defendants to the amount of the bond.

Plaintiff was in the automobile finance business in the city of Minneapolis. It purchased contracts of sale made by various automobile dealers in this community. One

Thomas Hunting was engaged in the automobile business at Montgomery, Minnesota, where the defendant Malone was Acting Postmaster. During the period in question, Hunting solicited plaintiff to purchase conditional sales contracts, including the promissory notes evidencing the obligation of the purchasers to pay the deferred installments thereon. It appears that Hunting became engaged in the practice of making out false and forged conditional [fol. 90] sales contracts and notes which were tendered for sale to the plaintiff. In carrying on its business with Hunting, plaintiff had a certain established practice with reference to the investigation of the purchasers named in the contracts tendered to it. Letters were mailed out by it to the credit references furnished. As soon as the contracts had been purchased, it was the custom to mail out payment books to the supposed purchasers in which were to be recorded by the plaintiff the monthly payments. Insurance certificates, receipts, etc., were also mailed out at this time to the purported purchasers. It appears that the various credit inquiries, which were generally addressed to banks, business concerns, and individuals in the vicinity of Montgomery, were sent through the United States mails and received at the Montgomery postoffice, but were seldom delivered to the persons to whom they were addressed. The evidence established that, at the request of Hunting, Malone, the postmaster, turned over to him substantially all of the mail which arrived at Montgomery in the envelopes of the plaintiff. When such mail was received by Hunting he at times would answer the credit inquiries himself, some letters were destroyed, and the inquiries which concerned actual persons, but who were not purchasers of cars, were occasionally delivered to the addressed credit references, and such references would generally respond to the plaintiff. The insurance certificates, payment books, etc., which [fol. 91] were mailed to the supposed purchasers were delivered to Hunting and retained by him. Not all of Hunting's contracts were made out to fictitious persons. Some were made out in the names of bona fide people, but the purported purchasers had not bought any cars from Hunting. It appears also that many of the cars listed in the contracts described automobiles with serial and motor numbers that were actually in existence, but the purchasers

of said cars as listed in the conditional sales contracts were either fictitious persons, or actual persons who had not in fact purchased the cars, nor had they [sined] the conditional sales contracts. In the conduct of its business with the purchasers named in the various conditional sales contracts purchased from Hunting, the plaintiff used the United States mails, but by reason of the arrangement between Hunting and the defendant Malone, the correspondence, inquiries, etc., did not reach the persons to whom the letters were addressed, but were received by Hunting instead, and in this manner he was able to dupe the plaintiff for a long period of time. In order to cover up his fraud, Hunting personally made payments to the plaintiff from time to time on the various fictitious contracts that he had sold. The evidence fairly established that plaintiff honestly believed that the contracts were bona fide, and also believed that the replies that it received from various credit references were genuine. It believed and relied upon the integrity of the United States mails and honestly assumed [fol. 92]' that the various mail matter addressed in connection with the contracts that it had purchased was being delivered to the persons to whom such mail matter was addressed. The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not directly establish that Malone was knowingly a party to the fraud. Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to convince Malone that it was perfectly proper for the "Midland mail" to be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict.

At the close of all the testimony, the defendant surety company made a motion for an order dismissing plaintiff's case on the following grounds:

"1. That plaintiff has no right to bring this action; that this defendant is and was under no liability or obligation to plaintiff either under the offici bond of the defendant Malone as Acti g Postmaster at Montgomery, Minnesota, or otherwise; that the sole party in interest who may sue on or recover under said official bond is the United States of America.

[fol. 93] "2. That plaintiff has failed to show any authority, permission or consent from the United States of America to institute or maintain this action on said official bond.

"3. That no authority, permission or consent was obtained by plaintiff from the United States of America to institute or maintain any action on said official bond.

"4. That the United States of America declined to give plaintiff authority, permission or consent to institute or maintain this action on said official bond.

"5. That the court is without jurisdiction to entertain this suit, which is one between plaintiff, a citizen and resident of the State of Minnesota, against defendant Malone, a citizen and resident of the State of Minnesota, and this defendant, a citizen and resident of the State of New York, wherein no separable controversy exists between the said defendants and plaintiff.

"6. That the court is without jurisdiction to entertain this suit in that it is not one arising under the Postal Laws of the United States of America.

"7. That the Postal Regulations of the United States of America, edition of 1932, particularly section 816 thereof, provides the sole, exclusive, and only method of recovery on the bond here involved, and that none of the matters and things required by said Regulations to be done and performed as a prerequisite to an action on said bond has been done or performed, either by plaintiff or otherwise."

It was the ruling on this motion which was deferred. The first four grounds urged by the defendant surety company in support of its motion for dismissal are the only ones that require any lengthy discussion. If plaintiff had

no right to proceed against the official bond of the postmaster to recover the damages sustained, without the approval or consent of the United States, obviously the mo-
[fol. 94] tion should be granted.

In considering the right of this plaintiff to sue on the postmaster's bond, there are certain well-recognized principles that should be considered. Where the statute provides that the obligee of an official bond shall be the United States, a third party is afforded no direct protection thereunder unless an intent to that effect can be read into the statute or statutes providing for such bond, or other statutes or regulations having bearing thereon. In absence of express language indicating such intention, the burden of proof necessarily rests upon the third party to establish his right to sue on the bond. Further, the fact that a third party has an interest in the faithful performance of the duties which the principal of the bond is required to perform, standing alone, does not establish the privity necessary to enable the third party to enforce its conditions and covenants. Washington vs. Young 10 Wheat. 406; German Alliance Ins. Co. vs. Home Water Supply Co., 226 U. S. 220; Howard vs. United States, 184 U. S. 176.

If the provisions of the pertinent statutes herein indicate the faithful fulfillment of the fiscal and fiduciary relationship between the Government and postmaster to be the primary object of the bond, it would negative any intention to embrace within its coverage any loss that the public might sustain by reason of the malfeasance or carelessness of the postmaster. It must be recognized that large sums of money are handled by this official and that it is of pri-
[fol. 95] mary importance that the Government be made secure if the breach of duty on the part of the postmaster results in loss to it. If the Government has no control over claims made against a postmaster's bond and is to be relegated to the role of an ordinary suitor without priority, its bond is of but little security. An examination of the statutes dispels any serious doubt as to the intention of Congress. It is apparent that the dominant purpose of this bond is to protect the Government. Certainly, if there are no statutory provisions which even suggest an intent to

cover private losses, such absence must be accorded great weight in determining the intendment of Congress.

The pertinent portion of Section 34, Tit. 39 U. S. C. A., which provides for a postmaster's bond, reads as follows:

"§34. Bond. Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

Section 377, Tit. 5 U. S. C. A. provides:

"§377. Form of bonds and contracts. All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America."

Other statutes which have a bearing upon postmasters' bonds will be found in the footnote.*

[fol. 96] There is no provision nor intimation in the statute that the patrons of a postoffice are to be given protection by the bond to be furnished. No assurance is given to the public that it may do business with the postal system

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* "Section 35. Approval of bonds. The bonds of all postmasters may by the direction of the Postmaster General be approved and accepted, and the approval and acceptance signed by the First Assistant Postmaster General or by the Fourth Assistant Postmaster General in the name of the Postmaster General."

"Section 36. New bonds; application of payments. Whenever any postmaster is required to execute a new bond, all payments made by him after the execution of such new bond, may, if the Postmaster General or the Comptroller General deem it just, be applied first to discharge any balance which may be due from such postmaster under his old bond."

"Section 37. Deficiency in accounts; notice to sureties. When a deficiency shall be discovered in the accounts of any postmaster, who after the adjustment of his accounts fails to make good such deficiency, it shall be the duty of the General Accounting Office to notify the Postmaster General of such failure, and upon receiving such notice the Postmaster General shall forthwith deposit a notice in the postoffice at Washington, District of Columbia, addressed to the sureties respectively upon the bonds of said postmaster, at the office where he or they may reside, if known; but a failure to give or mail such notice shall not discharge such surety or sureties upon such bond."

"Section 38. Vacancies; appointment of successors; period of liability on bonds; temporary appointments. Whenever the office of any postmaster becomes vacant, the Postmaster General or the President shall supply such vacancy without delay, and the Postmaster General shall promptly notify the General Accounting Office of the change; and every postmaster and his

and have recourse to the postmaster's bond. Section 36 would indicate that in the accounting the Government's loss alone was being considered in the bond protection. Further, it will be observed that in Section 37 the Government makes provision for the notice that must be given by it to the securities of any deficiency as disclosed in the accounts of any postmaster. Nothing is said about the notice that should be given in the event any patron claims loss by reason of the postmaster's neglect. Section 38 pertains to the period of liability on a postmaster's bond and prescribes the method by which the sureties may terminate their responsibility in case there is a vacancy in the office of postmaster and delay in filling it. This section would indicate [fol. 97] that, although a postmaster's office is vacant, the sureties are not released and are responsible for the safekeeping of the public property of the postoffice and the due performance of the duties thereof. That the primary purpose of the bond is to insure the inviolability of government property is emphasized by this section. No reference is made therein to any obligation to third parties, or the circumstances under which sureties might be absolved of responsibility to them. Section 40 prescribes a three-year

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sureties shall be responsible under their bond for the safe-keeping of the public property of the post office, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibilty, by giving notice, in writing, to the Postmaster General, such termination to take effect ten days after sufficient time shall have elapsed to receive a reply from the Postmaster General; and the Postmaster General may, when the exigencies of the service require, place such office in charge of a special agent until the vacancy can be regularly filled; and when such special agent shall have taken charge of such postoffice, the liability of the sureties of the postmaster shall cease."

"Section 40. Release of sureties on bond. If on the settlement of the account of any postmaster it shall appear that he is indebted to the United States, and suit therefor shall not be instituted within three years after the close of such account, the sureties on his bond shall not be liable for such indebtedness."

"Section 44. Neglect to render accounts. Whenever any postmaster neglects to render his accounts for one month after the time, and in the form and manner prescribed by law and the regulations of the Postmaster General, he and his sureties shall forfeit and pay double the amount of the gross receipts at such office during any previous or subsequent equal period of time; and if, at the time of trial, no account has been rendered, they shall be liable to a penalty of such sum as the court and jury shall estimate to be equivalent thereto, to be recovered in an action on the bond."

statute of limitations on the sureties' liability where suit shall not have been initiated within three years after the close of an account indicating liability of a postmaster to the United States. Section 44 provides that the sureties shall forfeit and pay double the amount of the gross receipts in the event the postmaster neglects to render his accounts [fol. 98] for one month after the time that they shall be due. Again, it may be pointed out that this provision, in prescribing an arbitrary penalty, would seem to negative any intention that anyone but the Government shall be entitled to protection. The statutes may be searched in vain for even the slightest suggestion that an intendment exists to protect the public against loss.

It is urged that, in that Section 34 requires a bond to be conditioned for the postmaster's "faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department," such clause is sufficient to include the duties and trusts that a postmaster should fulfill in carrying out the obligation that he owes to the public. But, in this connection, it must be recognized that this provision does not create any scope of coverage [fol. 99] inconsistent with the defendant surety company's position that it is limited to the named obligee. Obviously, there was no duty on the part of Congress to extend the coverage to the public. If it intended that the protection be limited to the named obligee, the quoted language from the statute would be the usual and customary covenants to be incorporated in the bond. The Court does not understand that a third party has the right to sue on an official bond merely because such right has not been specifically excluded. The burden nevertheless rests upon the plaintiff to establish that such right is expressly given or necessarily implied.

Plaintiff relies upon Howard vs. United States, supra (184 U. S. 676), but the distinction between the facts of that case and the instant situation is reasonably clear. The statute governing clerks of United States courts, which office was being considered by the court, required the clerk to give a bond to the United States conditioned, "faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the

court." The decrees, judgments, etc., obviously referred to proceedings in private cases, as well as the entry of these orders in litigation instituted by the Government. Congress evidently intended that a clerk's failure timely to enter or satisfy judgments in behalf of private suitors, for instance, would constitute a breach of the bond. The dominant purpose of the statute was not to protect the Government alone. Private litigants stood on an equal footing with the Government. There is no provision in any of the [fol. 100] statutes pertaining to a postmaster's bond which conditions the bond upon the postmaster's performance of any specified or direct duty to the public. The court placed particular emphasis upon the language of the statute providing for the bond that should be given by the clerk, and it is clear that it determined that, by reason of this language, Congress intended to afford coverage to the public where it had been damnified by the clerk's breach of duty. In discussing the liability of the clerk's bondsmen to private litigants, the court stated (p. 687):

"But it is said that the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the Government, and therefore no suit can be maintained on it for the benefit of an individual suitor, although such suitor may have been damaged by the failure of the clerk to discharge his duty. This results, it is supposed, from the fact that there is no statute expressly authorizing such a suit. If this position be well taken, it would follow that the bonds required to be given by clerks of the Federal courts are not in any case for the protection of private suitors. We are of opinion that Congress never intended that any such condition of things should exist, but intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to forty thousand dollars. It is impossible to suppose that, when requiring a clerk to give bond to the United States 'faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court,' Congress had in mind the interests of the United States alone, and purposely refrained from making any provision whatever for the security of private suitors in the Federal courts. Such a conclusion would be incon-

sistent with the practice of a century, and would greatly surprise the profession. As may well have been anticipated when those courts were first established, the great mass [fol. 101] of litigation in the District and Circuit Courts of the United States has always been between individuals, and consequently the words above quoted, it must be assumed, had reference to individual suitors as well as to the United States. In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge his duties or seasonably to record the decrees, judgments and determinations of the court. It must have been so understood when the courts of the United States were established and provision made for the appointment of clerks who should be entitled to receive the moneys of suitors when paid into court under its sanction or pursuant to any statute."

That there were more private than public litigants doing business with the office of clerk of court was especially true when the statute referred to in the Howard case was adopted. Private litigants directly depend upon the clerk of court faithfully to discharge the duties of his office. He owes a direct duty under the statute to private litigants. Large sums of money belonging to private suitors are often paid to the clerk. Such moneys are not paid to the Government as such. Private suitors rely upon the clerk "seasonably to record the decrees, judgments and determinations of the court." The use of this language must imply an intention on the part of Congress to permit a private claimant, who has been damaged by the clerk's malfeasance, direct recourse against the bond.

There is no showing in the Howard case that Congress had by statutory enactments provided exclusive ways and means for the Government to proceed against the sureties, or that there were statutes arbitrarily fixing the liability of the sureties to the Government, or that the [fol. 102] protection of Government property was the principal purpose of the bond. In that case, the statutory provisions and all the circumstances unmistakably indicated an intention to provide coverage for the private suitor as well as the Government, while in the instant case, every pertinent statute and circumstance, if not to the contrary, at least do not directly support the theory of coverage. The

Clerk's bond is approved by the court. He is appointed by the court and occupies a direct fiduciary relation to the public and to the Government. The bond of a postmaster is approved by the Postmaster General. Postmasters of the first, second and third classes are appointed by the President, with the advice and consent of the Senate. Elaborate provisions have been promulgated by the Postoffice Department regarding surety companies which are authorized to write bonds, the limitation on the penal sum of the bond in relation to the paidup capital and surplus of the surety, and the status and qualifications of surety companies. (Sections 69 to 72, inclusive, Postal Laws and Regulations).

It is evident that, by the adoption of various rules and regulations, the Government has endeavored to protect the public against the usual and normal losses that may occur on account of carelessness in the handling of the mails or otherwise. The payment of money to a postmaster on [fol. 103] postal savings, for instance, constitutes a direct obligation on the part of the Government to the patron. Provisions are made for registering and insuring mail matter. In Tit. 5 U. S. C. A. § 392, as amended June 22, 1934, the Government has outlined a summary method of settling claims arising by reason of the negligence and misconduct of the postmaster, where the same may be settled for less than $500.00. In Tit. 31 U. S. C. A. § 215, and also found in Section 59 (2) of the Postal Laws and Regulations, the head of the department is authorized to adjust and determine any claim on account of damages to, or loss of privately owned property where the amount of the claim does not exceed $1,000.00, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. The Postal Laws and Regulations under Section 59 (2) have promulgated detailed rules covering claims for such damages. Section 790, Tit. 39 U. S. C. A. and Postal Laws and Regulations No. 233 provide means whereby the postal department may distribute moneys that have been recovered through administrative action in instances where such moneys have been stolen from the United States mails. Section 816 of the Postal Laws and Regulations provides for suits by the United States and the distribution by appropriate administrative

[fol. 104] officers of the Postoffice Department among persons damaged "by loss, rifling, damage, wrongful delivery of, or depredations upon registered or other mail, and the failure to collect or remit C. O. D. funds."

While it is true that the Government may proceed to recover on a postmaster's bond for the total loss incurred and has a moral obligation to disburse the proceeds to the parties who may have sustained the loss (U. S. Fidelity and Guaranty Co. vs. United States, 246 F. 433; United States vs. U. S. Fidelity and Guaranty Co., 247 F. 16), the right of the Government to sue on a clerk of court's bond for the benefit of the public has also been sustained in United States vs. Abeel, 174 F. 12. However, the moral obligation of the Government to protect the patrons of the postoffice who may have suffered loss, whenever it may proceed against an available fund, is entirely consistent with the apparent purpose of the statutes in question. It is the Government that must institute the proceedings. If a surplus remains after the Government has been made whole, the public has the right to expect an equitable distribution of the balance. The present suit, being instituted by a private person without the consent of the Government, would exhaust the entire bond, and such a situation cannot be reconciled with the primary purpose of the stat-[fol. 105] ute, which is to provide means whereby the losses of the Government will be first indemnified. Certainly, such circumstances have a bearing upon the ultimate interpretation which should be made with reference to the intent of Congress. With the protection afforded to the public in its dealings with postmasters, it is reasonable to assume that Congress intended that direct recourse against the bond be limited to suits by the named obligee. If the recovery requires a distribution to private claimants, it is to be assumed that the obligee will fairly and equitably perform that duty.

It may be urged that the various administrative remedies afforded to patrons who may have sustained losses are not necessarily exclusive but are merely cumulative to the right of a private claimant to proceed against the bond. However, that argument might be persuasive if there ex-

isted any apparent intention manifested by Congress to provide direct bond protection for private patrons. The regulations and administrative remedies become significant however, because they tend to support the position that, not only has the Postoffice Department, as well as Congress, assumed that no direct remedy was afforded a private citizen under a postmaster's bond, at least without the obligee's consent, but it would appear that such remedies negative the implied intention which is the basis of this suit.

Plaintiff cites and emphasizes the case of United States ex rel. Brimberg Bros. vs. Globe Indemnity Co., 26 F. (2d) [fol. 106] 191. However, in that case not only did the Attorney General of the United States authorize the suit, but Congress had authorized the Secretary of the Treasury to provide security for the owners of merchandise hauled by carriers from the wharves of the City of New York to the appraisers' stores. The transportation of this merchandise arose by reason of custom duties imposed by the Government. The Secretary of the Treasury did promulgate a regulation as required by the statute, but neglected to indicate whether the bond to be provided by the carrier should secure the merchandise as well as the revenue in which the Government was solely interested. It appeared that the owner of the merchandise sustained a loss by reason of the carelessness of the carrier, who had furnished a bond under the statute. In that a bond was required by the regulation, the court implied from all the circumstances that the Government intended to provide protection by way of the bond furnished for the owners of the merchandise, as well as the revenue. The court was of the opinion that the facts warranted an implied intent to afford the owners of the merchandise redress against the bond. In view of the facts of this case, it is not an authority for plaintiff's theory of recovery in the instant situation.

The plaintiff cites many other cases, but they are not particularly helpful, and do not depart from the principle that the intendment of coverage must be either [exress] or [fol. 107] implied. The few reported cases which have dealt with suits on a postmaster's bond have held that a mail user may not maintain an action thereon.

In Idaho Gold Reduction Co., et al. vs. Croghan, et al., 56 Pac. 164, the Supreme Court of Idaho, in sustaining a demurrer to plaintiff's complaint, stated (p. 164):

"We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute."

In Wile vs. U. S. Fidelity & Guaranty Co., et al., (1918) 6 Alaska 48, a postmaster who had paid a loss to the Government occasioned by the embezzlement of an assistant postmaster, sued on the bond of the assistant postmaster to recover the amount paid. The pertinent statement of the court is as follows: (p. 49):

"I cannot see that any cause of action is stated in favor of Wile against the Surety Company. There is no privity of contract between them. The bond runs to the United States of America, and by its terms is to protect the government."

In United States vs. Griswold (Ariz. 1904) 76 Pac. 596, the court was considering the right of the United States to recover the entire loss sustained by the negligence of a postmaster, regardless of its limit of liability to the patrons who sustained the loss. In upholding the right of the United States to sue for the entire loss, the court made the following observation as to the right of a third party to proceed against the bond (p. 597):

[fol. 108] "At common law suit upon an official bond must be brought and a recovery had in the name of the obligee. There is no congressional statute modifying the common law limiting the liability of sureties to suits brought by or in the name of the United States, as there is in the case of bonds given by United States marshals. In the latter case there is statutory authority authorizing any person to bring, in his own name and for his sole use, suit on the marshal's bond for a breach of its conditions. Section 784, Rev. St. U. S. (U. S. Comp. St. 1901, p. 607). It follows, therefore, that P. Sandoval & Co. could not maintain a suit

on the postmaster's bond in their own name to recover for the loss of the registered package.

"* * * To hold that the United States may not maintain an action upon the bond of the postmaster for the recovery of the entire loss sustained by the negligence of the postmaster because it was not obligated to return or make good to P. Sandoval & Co. an amount exceeding $10, would be to deny to the latter any redress unless the postmaster be personally responsible to the extent of such loss."

In 49 C. J. 1145, §56, (citing Idaho Gold Reduction Co., et al. vs. Croghan, et al., supra, and United States vs. Griswold, supra) it is said:

"But it is well settled that, in the absence of special statutory authorization, a private person cannot sue on a postmaster's official bond for moneys coming into his hands in his official capacity and lost through his negligence or default."

The following cases also tend to support the conclusion reached herein: Robins Dry Dock & Repair Co. vs. Flint, et al., 275 U. S. 303; Fosmire vs. National Surety Co., 127 N. E. 472; Clark vs. United States, 60 Ga. 156.

The Government has refused to give its consent to the bringing of this suit. The only indication that the Court has received as to the Government's position in the matter is a brief filed during the trial by the United States At-[fol. 109] torney of this district as amicus curiae in support of the defendant surety company's position that the plaintiff has no right to bring this action on this bond. The plain intendment of the statute being to provide coverage for the Government alone, it is clear that the bringing [to] this suit without the consent of the Government forecasts serious complications and threatens to destroy that which the Government has provided for its own protection. It is no answer to say that the present suit will not jeopardize the Government because the present bond has been supplanted by a new bond obtained when Malone was elevated from Acting Postmaster to Postmaster. If a private citizen has the right to sue, the entire security provided by the bond may soon be exhausted by numerous pri-

vate suits. The fact that there is an utter absence of any statutes, rules or regulations whereby the paramount right of the Government may be safeguarded, tends to substantiate the defendant surety company's position that Congress did not intend that suits of this nature could be brought without the consent of the United States. In the Howard case, consent of the United States was not given, but it was reasonably clear, in view of all the circumstances, that Congress did intend to provide direct protection for the public in dealing with clerks of court. Where Congress apparently had intended to provide protection under the bond for private litigants, the court in that case was not particularly concerned with the conflicting interests that [fol. 110] might arise between the Government and the public; that is, the failure of Congress to provide suitable machinery to protect equitably all claimants against the clerk of court's bond should not militate against the right of redress that was clearly intended for private suitors. But, in absence of such expression by Congress, the adoption of plaintiff's theory herein would subject the protection intended for the Government to a multitude of suits, which was never in the contemplation of the parties.

In Washington vs. Young, supra (10 Wheat. 406), it appears that the City of Washington was conducting a lottery and had employed a manager who had given a bond to the city. Without its consent, suit was instituted in the name of the city for the benefit of a purchaser of a lottery ticket on the ground of an alleged breach of the bond by the manager of the lottery. In the opinion rendered by the court, Chief Justice Marshall stated (p. 407):

"The first inquiry is, into the right of the proprietors of the ticket No. 1037, to sue in the name of the corporation without its consent. Their counsel insists that the bond was taken for the benefit of the fortunate adventurers in the lottery, and that each has a right to use it. * * * They have undoubtedly 'a right to apply to the corporation to direct the suit, and the corporation could not, consistently with their duty, have refused such application,' if the purpose of the bond was to secure the fortunate adverturers in the lottery, not to protect the corporation itself. But the propriety of bringing such suit was a subject on which the

obligees had themselves a right to judge. If the proprietors of one prize-ticket had an interest in this bond, the proprietors of every other prize-ticket had the same interest; and it could not be in the power of the first bond adven- [fol. 111] turer who should seize and sue upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs against their own will. No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name af another, without his assent given in fact, or by legal intendment. * * * We think, then that this case is no authority for the power claimed by the proprietors of ticket No. 1037; and we think, upon general principles, they had no right to institute this suit without the consent of the corporation. * * * The proprietors of the ticket No. 1037 have shown no right to sue on this bond. * * * But if they have, without authority, put this bond in suit, the proper course is to turn them out of court, not to render a judgment, which may bar any future suit brought by the plaintiffs, whose names have been improperly used."

In Howard vs. United States, supra (184 U. S. 676, 691) the court discussed the case of Washington vs. Young and stated:

"That case undoubtedly is authority for the proposition that, generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent."

A fair analysis of the entire situation presented herein requires a finding that the legal intendment, which was found in the Howard case, does not exist and cannot be found in the instant proceeding. The Howard case must be limited to its particular facts. The "peculiar relation" of the clerk to the courts, as well as to the public, does not have its counterpart in the case at bar. That case does not hold that anyone injured by the conduct of an employee of the Government has the right to sue on an official bond

[fol. 112] where the United States is named as the sole obligee. It clearly upholds the principles enunciated in Washington vs. Young, supra, and German Alliance Ins. Co. vs. Home Water Supply Co., supra, that an absence of legislative intent to clothe an unnamed obligee with authority to proceed against the surety is fatal to an action on the bond instituted by him. The interest that every citizen may have at times in the faithful performance of the duties of a public employee, or the fact that damage results to him from a failure of such employee to fulfill carefully his duties, does not create the right. No third party has the right to obtain the advantage of any contract, official or otherwise, to which he is not a party, unless it can be shown that it was intended for his direct benefit.

It is highly significant that generally when it is the intention of Congress to permit private suits on bonds where the United States is named as obligee, express provision is found in the statute. Such provision will be found in the case of a bond to be furnished by a United States marshal, consular officer, or contractor performing public work for the Government. That Congress did not, under all the circumstances, intend that private parties should maintain a suit on this bond seems indisputable.

The Court is of the opinion that, if the right to sue on the bond existed, it would have jurisdiction, but a further discussion of the other grounds presented in the motion [fol. 113] becomes unnecessary in view of the conclusions indicated. It is therefore ordered that the defendant surety company's motion to dismiss plaintiff's cause of action on its merits be and the same hereby is granted. An exception is allowed to the plaintiff.

Dated this 16th day of May, 1938.

GUNNAR H. NORDBYE,
United States District Judge.

Filed May 16, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 114] (Supplemental Order Dismissing Cause As To Defendant, Patrick J. Malone, June 11, 1938.)

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

It appearing to the Court that on the 16th day of May, 1938, it filed its order herein granting the motion of the defendant National Surety Corporation to dismiss plaintiff's cause of action against said defendant on its merits, and it further appearing that at the time said motion was heard and argued, there was presented to the Court the motion of the defendant Patrick J. Malone, who likewise made a motion to dismiss at the close of all the testimony, the ruling on which motion was also deferred, and it further appearing that if the plaintiff has no right to proceed against the surety on the bond of defendant Malone, this Court has no jurisdiction as to the defendant Patrick J. Malone in [fol. 115] the above-entitled action, now, therefore,

It Is Ordered that the above-entitled action as to Patrick J. Malone be and the same is hereby dismissed by reason of the fact that the Court has no jurisdiction. It is further ordered that the judgment heretofore entered on October 29, 1937, against the said National Surety Corporation and the said Patrick J. Malone, and each of them, be vacated and set aside, and that judgment be entered in favor of said defendants, and each of them, together with their costs and disbursements herein.

An exception is allowed to the plaintiff.

Dated this 11th day of June, 1938.

GUNNAR H. NORDBYE,
United States District Judge.

Filed June 14, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 116] (Order of District Court Vacating Judgment of October 29, 1937; Judgment in favor of Defendants.)

In the District Court of the United States in and for the District of Minnesota, Fourth Division.

Term Minutes.

September Term, A. D., 1938.

Tuesday morning, June 14, 1938.

Court opened pursuant to adjournment,

Present: Honorable Gunnar H. Nordbye, Judge.

Margaret L. Mullane, Clerk,
By Thomas H. Howard, Chief Deputy.

(Before Nordbye, J.)

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

Pursuant to the supplemental order of this Court filed and entered herein on June 11, 1938, dismissing said action as to the defendant, Patrick J. Malone, vacating the judgment for plaintiff heretofore entered on October 29, 1937, and directing entry of judgment in favor of said defendants, it is now

Considered, Ordered and Adjudged: that the judgment entered herein in favor of said plaintiff as against said defendants on the 29th day of October, 1937, be and the same is hereby vacated and set aside; that said plaintiff do have and recover nothing from said defendants by reason of this its action against said defendants and that said defendants do have and recover of and from said plaintiff their costs and disbursements in this behalf expended, to be taxed, and do have execution therefor.

Further Ordered: that all further proceedings herein, except the taxation of costs and entry of judgment therefor, be and they are hereby stayed for a period of forty-two (42) days from and after this date for such further action as this plaintiff may be advised to take under the provisions of Rule XXI of this Court.

[fol. 117] Notice Of Appeal.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

To Doherty, Rumble, Butler, Sullivan and Mitchell, Attorneys for Defendant National Surety Corporation, a corporation, and George T. Havel, LeCenter, Minnesota, Attorney for Defendant Patrick J. Malone:

Please Take Notice, that the above named plaintiff has appealed, and does hereby appeal, to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment of the above named Court entered on June 14, 1938, by which judgment said Court dismissed plaintiff's bill of complaint.

Said appeal is taken from the whole of said judgment and from each and every part thereof.

LEONARD, STREET and DEINARD,
Attorneys for Plaintiff,
1036 Andrus Building,
Minneapolis, Minnesota.

Due and personal service of the within Notice of Appeal is hereby admitted this 23d day of August, 1938.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Attorneys for Defendant,
National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Defendant,
Patrick J. Malone.

Filed August 29th, 1938. Margaret L. Mullane, Clerk, By Chell M. Smith, Deputy.

[fol. 118] Order Allowing Appeal.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

Plaintiff herein having petitioned for an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment in this cause entered June 14, 1938,

It Is Ordered that an appeal be, and hereby is, allowed to plaintiff from the judgment of this Court in this cause entered June 14, 1938 to the United States Circuit Court of Appeals for the Eighth Circuit.

It Is Further Ordered, that the Clerk of this Court prepare and certify a transcript of the record herein, or so much thereof as the parties, or either of them, may by stipulation or otherwise designate, or so much as may be designated by order of the Court, and transmit the same and file it with the United States Circuit Court of Appeals, as provided by law.

It Is Further Ordered, that said appeal shall be effective upon the filing by plaintiff of a supersedeas bond in the sum of $500, with sufficient sureties to be approved by the Court, and that upon the filing of said bond so approved, all proceedings herein be stayed and superseded during the pendency of said appeal.

GUNNAR H. NORDBYE,
United States District Judge.

Dated: August 19, 1938.

[fol. 119] Petition For Allowance of Appeal, Assignment of Errors and Prayer For Reversal.

To the Honorable United States District Court For the District of Minnesota:—

Now Comes Midland Loan Finance Company, use-plaintiff in the above entitled action (hereinafter referred to as plaintiff) and shows that on June 14, 1938, the above named District Court entered a judgment herein, in which judgment and in the proceedings prior thereto, certain errors were committed to the great prejudice of the plaintiff, which errors are hereinafter assigned in detail. Plaintiff makes the following assignments of errors, which it avers occurred in the entry of said judgment in said cause and in the proceedings prior thereto as follows:

The Court erred:

1. In entering its judgment dismissing this cause against defendants, and each of them.

2. In granting defendant National Surety Corporation's motion to dismiss plaintiff's cause of action on its merits.

3. In granting defendant Patrick J. Malone's motion to dismiss plaintiff's cause of action for lack of jurisdiction.

4. In ordering that the judgment heretofore entered in favor of plaintiff and against defendants National Surety Corporation and Patrick J. Malone, and each of them, on October 29, 1937, be vacated and set aside.

[fol. 120] 5. In holding that plaintiff had no right to bring this action against defendants, or either of them, on the acting postmaster's bond given by defendant Patrick J. Malone to the United States of America.

6. In holding that plaintiff had no right to bring this action without the consent or permission of the United States of America.

7. In holding that Midland Loan Finance Company, as a patron of the Montgomery, Minnesota, Post Office, was not one of the class of persons intended to be benefited by said postmaster's bond.

8. In holding that said acting postmaster's bond was not intended to afford any coverage or protection to plaintiff.

9. In holding that the plaintiff had no right to maintain this action against defendants, or either of them, without the consent of the United States.

10. In holding that Congress, in requiring postmaster's bonds, "did not under all the circumstances, intend that private parties should maintain a suit" thereon.

Wherefore, plaintiff prays:

1. That an appeal be allowed from said judgment and all thereof to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of said errors so complained of, and that a transcript of the record, proceedings and judgment in this cause duly authenticated, or so much thereof as the parties, or either of them, may by stipulation or otherwise designate, or so much thereof as may be designated by order of the Court, be sent to the United States Circuit Court of Appeals, and

2. That said judgment herein on account of said errors above specified, and all other manifest errors in the record in the proceedings herein be reversed, and that plaintiff be restored to all things which he has lost, or may come to lose by reason of said erroneous judgment, and for [fol. 121] such other relief as may be proper.

LEONARD, STREET and DEINARD,
Attorneys for Plaintiff,
1036 Andrus Building,
Minneapolis, Minnesota.

Dated: August 18, 1938.

Due and personal service of the within Petition, Assignments of Error and Order Allowing Appeal is hereby admitted this 23rd day of August, 1938.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Attorneys for Defendant,
National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Defendant,
Patrick J. Malone.

Filed August 29, 1938. Margaret L. Mullane, Clerk, By Chell M. Smith, Deputy.

[fol. 122] Supersedeas Bond on Appeal.

Know All Men By These Presents, That we, Midland Loan Finance Company, as principal and Saint Paul-Mercury Indemnity Company Of Saint Paul a corporation organized under the laws of the State of Delaware, as surety, are held and firmly bound unto the above named defendants, and each of them, in the sum of Five Hundred Dollars ($500), lawful money of the United States, to be paid to the said defendants, their heirs, executors, administrators, and assigns, for which payment well and truly to be made, the said principal and surety bind themselves, their heirs, personal representatives, successors, and assigns, jointly and severally by these presents.

The Condition Of This Obligation Is Such, That whereas the above named plaintiff has petitioned for and been allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment of this Court in this cause entered June 14, 1938.

Now, Therefore, If the said plaintiff above named shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then this obligation shall be void, otherwise to remain in full force and effect.

In Testimony Whereof, The principal and surety have [fol. 123] caused this instrument to be executed this 18th day of August, 1938.

MIDLAND LOAN FINANCE COMPANY,
By Herman Schlieff, Its President.

SAINT PAUL-MERCURY INDEMNITY COMPANY OF SAINT PAUL,
By Gaylord Warner, (Seal)
Its Attorney-in-fact.

Signed, sealed and delivered
in the presence of:

Edith A. McGarvey,
Virginia A. Clarke,
As to Principal.

A. K. Johnson,
M. K. Pennington,
As to Surety.

* * *

State of Minnesota,
County of Hennepin—ss.:

On this 18 day of August, 1938, before me, a Notary Public within and for said County, personally appeared Herman Schlieff, to me personally known, who, being by me duly sworn, did say, that he is the President of the Midland Loan Finance Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Herman Schlieff acknowledged said instrument to be the free act and deed of said corporation.

EDITH A. McGARVEY,
Notary Public, Hennepin County, Minn.

(Notarial Seal)

My Commission Expires Nov. 11, 1944.

State of Minnesota,
County of Hennepin—ss.:

Acknowledgment of Attorney-in-Fact.

On this 18th day of August 1938, before me, a Notary Public, within and for the said County and State, personally appeared Gaylord Warner to me personally known, who being duly sworn, upon oath did say that he is the Agent and Attorney-in-Fact of and for the Saint Paul-Mercury Indemnity Company of Saint Paul, Saint Paul, Minnesota, a corporation, created, organized and existing under and by virtue of the laws of the State of Delaware, that the corporate seal affixed to the foregoing within instrument is the seal of the said Company; that the seal was affixed and the said instrument was executed by the authority of its Board of Directors; and he did also acknowledge that he executed the said instrument as the free act and deed of said Company.

M. K. PENNINGTON,
Notary Public.

(Notarial Seal)

M. K. PENNINGTON,
Notary Public, Hennepin County, Minn.
My Commission Expires May 31, 1943.

The within bond is hereby approved this 19 day of August, 1938, to operate as a supersedeas.

GUNNAR H. NORDBYE,
United States District Judge.

Due and personal service of the within bond is hereby admitted this 23rd day of August, 1938.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Attorneys for Deft. National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Deft. Patrick J. Malone.

Filed August 29th, 1938. Margaret L. Mullane, Clerk, By Chell M. Smith, Deputy.

Citation.

[fol. 124] United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

No. 3681. vs. Law.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

The United States of America to the Above Named Defendants:—

You Are Hereby Cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, State of Missouri, within forty (40) days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the District of Minnesota, Fourth Division, in the above entitled cause, wherein the above named plaintiff is appellant, and you, the said defendants above named are appellees, and show cause if any there be, why the judgment entered in this cause on June 14, 1938, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

GUNNAR H. NORDBYE,
United States District Judge.

Dated: August 19th, 1938.

Due and personal service of the within Citation is hereby admitted this 23rd day of August, 1938.

DOHERTY, RUMBLE, BUTLER, SULLIVAN & MITCHELL,
Attorneys for Defendant National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Defendant Patrick J. Malone.

Endorsed: Filed in U. S. District Court on August 29, 1938.

[fol. 126] (Order Extending Time to File Transcript.)

The above named plaintiff having made application for an order extending the time within which defendants are to appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, and good cause being shown therefor,

Such application is hereby granted and the time for such appearance is hereby extended twenty (20) days from and after September 28, 1938.

GUNNAR H. NORDBYE,
Judge of United States District Court.

Dated: September 20, 1938.

Filed September 20, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 127] (Clerk's Certificate to Transcript.)

United States of America, District Court of the United States, District of Minnesota, Fourth Division.

I, Margaret L. Mullane, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 126 pages, numbered consecutively from 1 to 126, inclusive, is a true and complete transcript of the record and proceedings in said cause, wherein United States of America, for the use and benefit of Midland Loan Finance Company, a Corporation, is plaintiff, and National Surety Corporation, a Corporation, and Patrick J. Malone are defendants, and of the whole thereof (except as modified by the praecipe of said plaintiff to be found at page 1 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify and return that I have annexed to said transcript and included within said paging the original Citation, together with proof of service thereof.

Seal
U. S. Dist. Court
Fourth Div.
Dist. of Minn.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court at Minneapolis, in the District of Minnesota, this 14 day of [October] October, A. D. 1938.

MARGARET L. MULLANE,
Clerk.

By Thomas H. Howard,
Chief Deputy Clerk.

Filed Oct. 21, 1938. E. E. Koch, Clerk.

[fol. 100] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

United States of America, for the use and benefit of Midland Loan Finance Company, Appellant,
No. 11,347. vs.
National Surety Corporation, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

GEORGE B. LEONARD,
BENEDICT DEINARD,
H. E. EDELMAN,
1036 Andrus Building,
Minneapolis, Minnesota.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 21, 1938.

(Appearance of Mr. M. J. Doherty, Mr. Pierce Butler, Jr., and Mr. R. O. Sullivan as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

M. J. DOHERTY,
PIERCE BUTLER, JR.,
R. O. SULLIVAN,
E-1006 First Nat. Bank Bldg.,
St. Paul, Minn.

[fol. 101] (Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 27, 1938.

(Appearance of Mr. George T. Havel as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

GEORGE T. HAVEL,
Attorney for Patrick J. Malone,
LeCenter, Minnesota.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 21, 1939.

(Order of Submission.)

March Term, 1939.

Monday, March 20, 1939.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Benedict Deinard for appellant, continued by Mr. Pierce Butler, Jr., for appellee National Surety Corporation, and by Mr. George T. Havel for appellee Patrick J. Malone, and concluded by Mr. Benedict Deinard for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to appellant to file a reply brief.

[fol. 102] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,347.—March Term, A. D. 1939.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Appellant, vs. National Surety Corporation, a corporation, and Patrick J. Malone, Appellees.	Appeal from the District Court of the United States for the District of Minnesota.

[April 21, 1939.]

Mr. Benedict Deinard (Mr. George B. Leonard was with him on the brief) for appellant.

Mr. Pierce Butler, Jr. (Mr. Michael J. Doherty and Mr. Robert O. Sullivan were with him on the brief) for appellee, National Surety Corporation.

Mr. George T. Havel for appellee, Patrick J. Malone.

Before SANBORN, THOMAS and VAN VALKENBURGH, Circuit Judges.

THOMAS, Circuit Judge, delivered the opinion of the court.

On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, without the consent of the government, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee without the written consent of the sender?

The lower court in an able and exhaustive opinion held that such an action can not be maintained. The motion of the surety to dismiss the complaint was sustained on the grounds that the United States is the sole party in interest entitled to sue or to recover on the bond and that the plaintiff, not having obtained the government's consent so to do, can not maintain an action in the name of the United States. *See United States, for Use and Benefit of Midland Finance Co.* v. *National Surety Corporation, et al.*, 23 F. Supp. 411. The court also dismissed the action against Malone, the principal on the bond, for lack, in the absence of the surety as a party, of the requisite diversity of citizenship to confer jurisdiction. The plaintiff assigns error directed to both rulings, but the argument in this court is addressed exclusively to the alleged errors relating to the sustaining of the surety's motion.

The material facts are not in dispute. The appellant, Midland Loan Finance Company, brought the action for its use and benefit

in the name of the United States against the principal and surety to recover the penalty of the bond in the sum of $16,000. The total alleged loss was $34,997.03. The consent of the United States to bring the suit was not obtained. The question presented was properly saved in the lower court.

The appellant is a corporation engaged in the automobile finance business at Minneapolis, Minnesota. It purchases contracts of sale from automobile dealers. Thomas Hunting was such a dealer at Montgomery, Minnesota, where the defendant Malone was acting postmaster. Hunting sold to the appellant conditional sales contracts including the installment notes of the purchasers. In submitting contracts and notes to appellant Hunting gave credit references. Appellant addressed letters to the makers of the contracts and to the credit references at Montgomery. At the request of Hunting the postmaster delivered to him substantially all of the letters received at Montgomery in appellant's envelopes. Hunting then sold to appellant spurious contracts made in the name of fictitious persons with fictitious credit references. Since he received the mail addressed to such fictitious names he was enabled to defraud the appellant of the moneys for which damage is sought in this action. It is not claimed that any of the lost funds came into the possession of the acting postmaster or that he had any knowledge of the fraud that was being perpetrated by Hunting. The appellant not only did not consent to the delivery of its letters to Hunting, but it was ignorant of the fact that they were not delivered to the persons addressed.

The bond, given by the defendants as principal and surety, bound them "to pay to the United States of America the sum of Sixteen Thousand dollars" on condition that if Malone "shall faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law * * * then this obligation shall be void; otherwise, of force."

The bond was made and delivered pursuant to section 34 Title 39 U. S. C. A., which provides:

Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such

penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department.

Other pertinent statutes provide:

All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America. 5 U. S. C. A. §377.

All suits * * * arising under the postal laws, shall be brought in the name of the United States. 28 U. S. C. A. §732.

The Postal Laws and Regulations, Edition of 1932, provide:

Section 777 1. Mail matter should be delivered to the person addressed or in accordance with his written order.

2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office.

Section 816 provides for recovery of loss due to wrongful delivery from the postal employee responsible therefor by the Chief Inspector by proceedings in the department, and that

7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear.

It will be observed that this is not an action against the postmaster sounding in tort nor one against the United States on the theory of respondeat superior. It is an action on a bond by a stranger to the contract brought without the consent of the obligee. If it be assumed that the postmaster breached the bond by failing to require Hunting to file with him the written order of the addressees before delivering the letters in accordance with the provisions of section 777 of the Postal Regulations it does not follow that appellant is entitled to maintain the action. No federal statute authorizes such procedure; and it is the general rule that "a third person cannot sue for the breach of a contract to which he

is a stranger unless he is in privity with the parties and is therein given a direct interest." *German Alliance Insurance Co.* v. *Home Water Co.*, 226 U. S. 220, 234. This rule has frequently been invoked in determining whether a person other than the obligee named in a bond may sue for its breach. *Federal Surety Co.* v. *Minneapolis Steel & Machinery Co.*, 8 Cir., 17 F. (2d) 242; *Chicago, R. I. & P. Ry. Co.* v. *Maryland Casualty Co.*, 8 Cir., 75 F. (2d) 596, 599; *United States* v. *United States Lines*, D. C. N. Y., 24 F. Supp. 427. Generally, in the absence of some enabling statute, the obligee named in the bond is the only person entitled to maintain an action upon it. *Bowers* v. *American Surety Co.*, 2 Cir., 30 F. (2d) 244; *Washington* v. *Young*, 10 Wheat. 406; *Howard* v. *United States*, 184 U. S. 676; *Moody* v. *Megee*, D. C. Tex., affirmed by the 5th Cir. in 41 F. (2d) 515; *District of Columbia, to Use of Langellotti* v. *Fidelity & Deposit Co. of Maryland*, App. D. C., 271 F. 383; *Equitable Surety Co.* v. *Board of Commissioners*, 5 Cir., 256 F. 773, 775; *United States* v. *Abeel*, 5 Cir., 174 F. 12, 18; *United States* v. *Griswold*, (Ariz.) 76 Pac. 596 (suit on a postmasters bond); and see *Munroe* v. *Raphael*, 288 U. S. 485, 488.

In *Washington* v. *Young*, *supra*, Chief Justice Marshall said: "No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the Legislature; and no person can be authorized to use the name of another, without his assent given in fact, *or by legal intendment*." It is the appellant's contention that, although the government has not consented to an action on the bond in the name of the United States, the obligee named therein, it has such right by virtue of "legal intendment", that is, that it was the intention of Congress, as shown by the statutes quoted supra, to confer upon the users of the United States mails the right to sue upon the bonds of postmasters in the name of the United States for the benefit of such users. To support this contention appellant relies upon the decision of the Supreme Court in *Howard* v. *United States*, *supra*. In that case it was held that a private suitor might maintain an action in the name of the United States on the bond of a clerk of a federal court executed pursuant to a federal statute and naming the United States as obligee. The clerk had embezzled funds deposited in his hands by the suitor. The court found that in view of the fact that the great mass of litigation in the federal courts was between individuals, Congress must have intended that a clerk's bond should be for the protection of both public and private suitors, and it held that consent to sue in the name

of the obligee, the United States, might be assumed to arise by legal intendment.

We are urged to find a similar legal intendment in the statute under which the bond in suit was taken. In this connection it is said that the letter of the statute confers benefits upon users of the mails as well as upon the government; that the postal regulations relating to the safe conduct of the mail are primarily for their benefit; and that the situation is similar to that in the Howard case in that the principal purpose of the postal system is to transmit private mail. We are of the opinion, however, that these considerations are outweighed by the fact that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond primarily for the government's protection. It is reasonable to presume that Congress intended primarily to protect that interest in enacting the statute requiring postmasters to give bond. The related statutes and postal regulations all point to this conclusion. No inference may be drawn from them that Congress intended to extend the protection of the bond to private mail-users. Support for these conclusions will be found in *Idaho Gold Reduction Co.* v. *Croghan,* (Ida.) 56 Pac. 164; *United States* v. *Griswold,* (Ariz.) 76 Pac. 596; 49 C. J. 1455. The plaintiff's argument and authorities fall far short of establishing the proposition that the bond in suit was required for the direct benefit of private mail-users, or that a legal intendment permitting them to sue on the bond should be read into the statute. We conclude that the dominant purpose of Congress was to provide protection to the United States.

These conclusions are not inconsistent with those decisions in which the government in actions brought in the name of the United States upon similar bonds has recovered for the theft of registered letters and the like, even in the absence of the assertion of a claim by the sender or proof of loss to the government other than the interference with its special property right as a bailee. In such cases the injury to its property right and the moral, and perhaps legal, obligation to refund the amount of the recovery to the mail-user are said to sustain a suit on the bond for the value of the lost property irrespective of the fact that the government may not be liable to the mail-user for that amount. *National Surety Co.* v. *United States,* 8 Cir., 129 F. 70; *United*

States v. *American Surety Co.*, C. C. Ill., 155 F. 941; *United States* v. *American Surety Co.*, 4 Cir., 163 F. 228; *Gibson* v. *United States*, 1st Cir., 208 F. 534; *United States Fidelity & Guar. Co.* v. *United States*, 9 Cir., 246 F. 433. Whether these authorities would sustain an action by the government in this instance need not be determined. The indirect benefit to the plaintiff, if the government may maintain such an action in its interest, does not justify the present suit. *United States* v. *United States Lines Co.*, D. C. N. Y., 24 F. Supp. 427.

The judgment is

Affirmed.

[fol. 108] (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1939.

Monday, April 24, 1939.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Appellant,

No. 11,347. vs.

National Surety Corporation, a corporation, and Patrick J. Malone.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the National Surety Corporation, a corporation, and Patrick J. Malone have and recover

against the United States of America, for the use and benefit of the Midland Loan Finance Company, a corporation, the sum of Twenty Dollars for their costs herein and have execution therefor.

April 24, 1939.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,347.

AT LAW.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Appellant,

vs.

NATIONAL SURETY CORPORATION, A CORPORATION; AND PATRICK J. MALONE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

PETITION FOR REHEARING.

Now comes the Appellant and petitions the above named Honorable Court for a rehearing of the above entitled case on appeal.

Grounds of Petition

The grounds of this petition for rehearing are as follows:

I.

A material matter of fact and law was inadvertently overlooked by the Court, as shown by its opinion, in that the Court, in the first paragraph of the opinion, stated:

> "On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, *without the consent of the government*, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee without the written consent of the *sender?*" (Italics supplied.)

As shown by those portions of our briefs relying upon *Howard vs. United States*, 184 U. S. 676, the appeal involves *two* questions:

1. Does a postmaster's bond, conditioned as required by 39 U. S. C. A., Sec. 31, make users of the mails, as well as the Government, beneficiaries of the bond?

2. If so, has Congress manifested intent that a user of the mails shall have the right to sue on the bond in the name of the United States, without first securing consent of an administrative officer of the Government?

We respectfully submit that it is important that these two distinct questions be kept unconfused.

It will be noted that in the *Howard Case*, *supra*, the United States Supreme Court separately treated and discussed the questions as to who were beneficiaries of the bond there sued on and as to whether a private beneficiary could sue on a

bond in which the United States was named sole obligee.

In the similar situation involved in the *Hoicard Case*, when that case was before this Court (102 Fed. 77), the Court first considered the question as to the coverage of the bond (p. 82). Then, having determined that the bond protected private persons as well as the Government, the Court considered the question as to a private person's right to sue on the bond in the name of the United States without any other consent of the United States than that evinced by the statute conferring a benefit upon private persons as well as the Government (p. 84).

We, also, submit that this Court, in the case at bar, overlooked a material matter of fact in assuming that the question presented by the appeal is limited to a case where there has been a delivery of mail to one other than the addressee "without the written consent of the *sender*." It is probable that the Court meant "addressee," instead of "sender," because Postal Regulations, Sec. 777, par. 1, provides for delivery of mail "to the person addressed or in accordance with his written order." But even then sight is lost of the fact that the lower court and a jury have found that the postmaster's wrongdoing was more serious than the mere delivery of mail without written consent of the sender or the addressee. This point more fully appears in the next ground of this petition.

II.

A material matter of fact was inadvertently overlooked by the Court, as shown by its opinion, in that the Court says of Appellee Malone's conduct as acting postmaster, that there is no showing that he "had any knowledge of the fraud that was being perpetrated by Hunting"; the Court overlooking the following stated facts found by the trial judge:

"The testimony indicated that Malone knew of Hunting's business relations with plaintiff, but it did not *directly* establish that Malone was knowingly a party to the fraud. * * * *However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict*" (Tr. p. 72, f. 92). (Italics supplied.)

It will be noted that Judge Nordbye did not find that there was no evidence establishing that Malone was knowingly a party to the fraud, but that there was no testimony *directly* establishing that fact. The record does not negative a finding by the jury on competent circumstantial evidence that Malone did know of the fraud that was being perpetrated upon appellant. And since appellees have taken no steps to review the verdict, we respectfully submit that it should be assumed, in support of the verdict, that there was ample evidence to sustain a finding of Malone's culpability.

III.

A material matter of fact and law was inadvertently overlooked by the Court, as shown by its opinion, in that the Court held that the considerations (1) that the letter of 39 U. S. C. A., Sec. 34, confers benefits upon users of the mail as well as upon the Government, (2) that the postal regulations relating to the safe conduct of the mail are primarily

for their benefit, and (3) that the principal purpose of the postal system is to transmit private mail, "are outweighed by the fact that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond *primarily* for the Government's protection." (Italics supplied.)

Without attempfing to reargue the question as to whether Congress intended that the Government and users of the mails should be co-ordinate beneficiaries on postmasters' bonds, we draw attention that the Court's conclusion "that the statute requires a bond *primarily* for the Government's protection" does not exclude our right to recover on the bond. *Primary* protection, of course, implies that there is *secondary* protection, and, in view of the fact that the Record shows that the Government has no claim on this bond and can have none, the way is clear for recovery by appellant as the only aggrieved beneficiary of the bond.

The same considerations extend to the Court's statement in the last sentence of the next to the last paragraph of its opinion: "We conclude that the *dominant* purpose of Congress was to provide protection to the United States." A dominant purpose, of course, implies the existence of one or more subordinate but important purposes.

We respectfully submit that the importance of the questions involved on this appeal not only to appellant, but also to all users of the mail, justifies a reconsideration by the Court of those questions.

GEORGE B. LEONARD,
BENEDICT DEINARD,
1036 Andrus Building,
Minneapolis, Minnesota,
Attorneys for Appellant.

CERTIFICATE

State of Minnesota,

ss.

County of Hennepin.

I, Benedict Deinard, do hereby certify that I am attorney and counsel for Appellant in the above entitled action; that the foregoing petition for rehearing is filed in good faith and is believed by me to be meritorious; and that the petition is not made vexatiously and is not made for delay.

Dated this 27th day of April, 1939.

BENEDICT DEINARD.

(Endorsed): Filed in U.S.Circuit Court of Appeals, May 1, 1939.

[fol. 115] (Order Denying Petition for Rehearing.)

May Term, 1939.

Wednesday, May 10, 1939.

The petition for rehearing filed by counsel for appellant in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

May 10, 1939.

[fol. 116] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the United States of America, for the Use and Benefit of Midland Loan Finance Company, a Corporation, was Appellant and the National Surety Corporation, a Corporation, and Patrick J. Malone were Appellees, No. 11,347, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-fourth day of May, A. D. 1939, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of July, A. D. 1939.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

FILE COPY

JUL
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 236

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Petitioner (Plaintiff-Appellant below),

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE,

Respondents (Defendants-Appellees below),

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

BENEDICT DEINARD,
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INDEX.

SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
Summary and Short Statement of the Matter Involved	2
A. Questions Presented	4
B. Statement of Facts	6
Condition of Bond	6
Statutes Involved	8
Regulations Violated by Postmaster	9
Government's Relation to Bond	10
Reasons Relied on for the Allowance of the Writ	11
Prayer for Writ	14
Brief in Support of Petition for Certiorari	15
Opinions of the Courts Below	15
Jurisdiction of this Court	15
Statement of the Case	16
Specification of Errors Assigned	16
Summary of Argument	18
Argument	19
I. The Circuit Court of Appeals has decided important questions of federal law which have not been, but which should be settled by this Court	19
II. The Circuit Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court	23
III. The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals on the same matter	29
IV. The decision of the Circuit Court of Appeals is in conflict with its own decisions on the same matter	34
Conclusion	35

TABLE OF CASES.

American Surety Co. vs. United States (C. C. A. 5), 133 Fed. 1019 ..... 13, 33
Bosler vs. United States (C. C. A. 8), 26 Fed. (2d) 4 ..... 13, 34
Crooks vs. Harrelson, 282 U. S. 55, 60 ..... 12, 27
Federal Surety Co. vs. Minneapolis Steel & Machinery Co., 17 Fed. (2d) 242, 244 30
Gibson vs. United States (C. C. A. 1), 208 Fed. 534 ..... 13, 30, 31
Howard vs. United States, 184 U. S. 676 ..... 3, 4, 5, 12, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 32, 35, 36
Howard vs. United States (C. C. A. 8), 102 Fed. 77 ..... 13, 34
Idaho Gold Reduction Co. vs. Callaghan, 6 Idaho 471 ..... 12, 20
Massachusetts Bonding & Ins. Co. vs. United States (C. C. A. 7), 54 Fed. (2d) 1039 ..... 13, 32

Munroe vs. Raphael, 288 U. S. 485 22
National Surety Co. vs. United States (C. C. A. 8), 129 Fed. 70 ..... 12, 35
New Jersey Steam Nav. Co. vs. Boston Merchants Bank, 6 How. 344 12
Smith vs. United States, 179 U. S. 372, 381 ..... 12, 27
Teal vs. Felton, 12 How. 284 ..... 12, 22, 28
United States vs. Abeel (C. C. A. 5), 174 Fed. 12 ..... 13, 32
United States vs. American Surety Co. (C. C. A. 4), 163 Fed. 228 ..... 13, 30
United States vs. Atlantic Coast Line R. Co., 215 Fed. 56, 59 31
United States vs. Globe Indemnity Co. (C. C. A. 2), 26 Fed. (2d) 191 28
United States vs. Massachusetts Bonding & Ins. Co., 238 N. Y. 334, 144 N. E. 631 28
United States vs. Griswold, 6 Ariz. 453 ..... 12, 21
United States vs. United States Fidelity & Guaranty Co. (C. C. A. 6), 247 Fed. 16 ..... 13, 33
United States Fidelity & Guaranty Co. vs. United States (C. C. A. 9), 246 Fed. 433 ..... 13, 30, 31
United States vs. United States Lines Co. (D. C., S. D., N. Y.), 24 Fed. Supp. 427, 429 28
Washington vs. Young, 10 Wheat. 404 32

TEXT BOOKS CITED.

49 Corpus Juris, 1145, Sec. 56 ..... 21, 22
23 Opinions, Attorneys General, 476, 479 ..... 13, 33

STATUTES CITED.

5 United States Code Annotated, Sec. 22 26
5 United States Code Annotated, Sec. 377 ..... 9, 20
39 United States Code Annotated, Sec. 34 ..... 2, 4, 5, 8, 17, 18
28 United States Code Annotated, Sec. 732 27
Section 240(a) Judicial Code, as amended by Act of Congress of February 13, 1925, Ch. 229, Sec. 1 (43 Stat. 938; 28 U. S. C. A., Sec. 347) 16

POSTAL REGULATIONS CITED.

Postal Regulations, 1932, Secs. 702, 703, 775, 777 ..... 9, 10

Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Petitioner (Plaintiff-Appellant below),

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE,

Respondents (Defendants-Appellees below),

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, United States of America, for the Use and Benefit of Midland Loan Finance Company, a corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, to review a judgment of that Court entered on April 24, 1939 (R. 107-108), affirming a judgment of the United States District Court for the District of Minnesota, Fourth Division, which latter judgment dismissed plaintiff's cause of action on its merits (R. 89).

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action was brought on an acting postmaster's bond to recover damages sustained by the use plaintiff—hereinafter referred to as the plaintiff—through the acting postmaster's tortious misdelivery of letters mailed by plaintiff to the post office at Montgomery, Minnesota. Patrick J. Malone, the acting postmaster—hereinafter referred to as the "postmaster"—and the National Surety Corporation, the surety on the bond—referred to as the "surety"—were joined as defendants.

A jury found that the postmaster misdelivered the plaintiff's mail, in violation of the Postal Regulations and in violation of the bond sued on, and that the plaintiff sustained a loss aggregating at least $16,000, the amount of the verdict and the penal sum of the bond (R. 72). The verdict was returned against both defendants (R. 63), but the District Court later dismissed the action.

The District Court ordered dismissal of the action as to the surety on two grounds: (1) That the bond covered only such losses as might be sustained by the Government itself. (2) That the action was brought without the consent of the United States (R. 67, 70-87; 23 Fed. Supp. 411). The Court rejected the plaintiff's view: (1) That the statute requiring the bond (39 *U. S. C. A.*, Sec. 34) manifests an intention to benefit users of the mails as well as the Government. (2) That, by legal intendment, flowing from such intention, mail-users have a remedial right to sue on such bonds in the name of the United States.

The action was dismissed by the District Court, as to the postmaster, on the sole ground that, because the surety had

been dismissed from the action, diversity of citizenship was destroyed and the Court had no jurisdiction to proceed with the action between the remaining parties, both residents of Minnesota (R. 88).

The District Court's final judgment of dismissal was entered June 14, 1938 (R. 88).

August 18, 1938, plaintiff petitioned for leave to appeal to the Circuit Court of Appeals (R. 92-93). August 19, 1938, the appeal was allowed (R. 91) and notice of the appeal was served August 23, 1938 (R. 90).

In the Circuit Court of Appeals, pursuant to an opinion filed April 21, 1939 (R. 101; 103 Fed. (2d) 450), judgment was entered April 24, 1939, affirming the judgment of the District Court (R. 107-108). Petition for re-hearing (R. 109-113) was denied May 10, 1939 (R. 115), and this petition for a writ of certiorari follows.

A certified copy of the entire transcript of the record of all proceedings in the Circuit Court of Appeals is filed herewith.

The history of the rulings made in this case, as to the right of a user of the mails to maintain an action of this kind, is as follows:

Judge Joyce of the District Court, overruled defendants' separate demurrers to the complaint (R. 27-30), basing his order on *Howard vs. United States*, 184 U. S. 676 (R. 29). He ruled that that decision supported plaintiff's right to sue.

Judge Nordbye, who tried the case in the District Court, dismissed the action on the ground that a private mail-user could not sue on a postmaster's bond without the Government's consent. He ruled that Congress had not manifested intention to permit such suit (R. 87; 103 Fed. Supp. 420). Judge Nordbye intimated that the Government could have

sued on the bond and would have been under a *moral* obligation to disburse the proceeds of recovery to this plaintiff (R. 81; 103 Fed. Supp. 417), and that had the Attorney General consented the action might have been brought in its present form (R. 84; 103 Fed. Supp. 419).

The Circuit Court of Appeals followed substantially the same reasoning as did Judge Nordbye. The Court of Appeals treated the case as involving but one question—whether or not a private user of the mails could sue, without the consent of the Government, upon a postmaster's bond (R. 102; 103 Fed. (2d) 450). (It will be noted that the Court did not do what was done in the analogous case of *Howard vs. United States*, 184 U. S. 676, divide the question, by inquiring, first, whether the bond was intended by Congress to benefit private persons, and, second, if so, whether a private person could sue on the bond without any consent of the Government other than that to be inferred from the intention manifested by the Congress.)

A.

QUESTIONS PRESENTED.

1. Does a postmaster's bond, conditioned, as required by 39 *U. S. C. A.*, Sec. 34, for "faithful discharge of all duties and trusts imposed on him" by law or regulations of the Post Office Department, inure to the benefit of private users of the mail, as well as the Government itself, in view of the existence of regulations forbidding the postmaster to make unauthorized delivery of letters, etc.?

2. If the last stated question be answered affirmatively, has Congress manifested intent that a user of the mails shall have a right to sue on the bond in the name of the United

States for his own use, without first securing consent of an administrative officer of the Government?

The Circuit Court of Appeals recognized that, under the decision in *Howard vs. United States*, 184 U. S. 676, a private person may sue on the bond of a federal officer, although, in form, the United States is named as the sole obligee of the bond, where the nature of the duties of the officer toward both the Government and private persons is such that it may be inferred that Congress intended that the bond cover both public and private rights. The Circuit Court of Appeals recognized that, under *Howard vs. United States, supra,* consent of the United States to the bringing of a suit by a private person in the name of the United States on such a bond may be assumed to arise by legal intendment, flowing from interpretation of the bond as being for private, as well as public, benefit (R. 105-106; 103 Fed. (2d) 452).

But the Circuit Court of Appeals decided that, despite the close resemblance between the wording of the federal court clerk's bond involved in the *Howard Case, supra*, and the bond here involved, and despite the close resemblance between the statutes under which the bonds were respectively given, there was no room for holding that a postmaster's bond inures to private, as well as public, benefit (R. 106; 103 Fed. (2d) 452).

In so holding, we believe that the Circuit Court of Appeals erred, both in its interpretation of 39 *U. S. C. A.*, Sec. 34—the statute under which the bond here involved was given—and in its holding that the principle of the *Howard Case* does not here apply.

B.

STATEMENT OF FACTS.

As noted in the opinion of the Circuit Court of Appeals (R. 102; 103 Fed. (2d) 451), the material facts are not in dispute.

The principal underlying facts are thus concisely stated by the Circuit Court of Appeals:

> "The appellant [plaintiff] is a corporation engaged in the automobile finance business at Minneapolis, Minnesota. It purchases contracts of sale from automobile dealers. Thomas Hunting was such a dealer at Montgomery, Minnesota, where the defendant Malone was acting postmaster. Hunting sold to the appellant conditional sales contracts including the installment notes of the purchasers. In submitting contracts and notes to appellant, Hunting gave credit references. Appellant addressed letters to the [supposed] makers of the contracts and to the credit references at Montgomery. At the request of Hunting the postmaster [defendant Malone] delivered to him substantially all letters received at Montgomery in appellant's envelopes. Hunting then sold to appellant spurious contracts made in the names of fictitious persons with fictitious credit references. Since he received the mail addressed to such fictitious names he was enabled to defraud the appellant of the moneys for which damage is sought in this action. It is not claimed that any of the lost funds came into the possession of the acting postmaster or that he had any knowledge of the fraud that was being perpetrated by Hunting. The appellant not only did not consent to the delivery of its letters to Hunting, but it was ignorant of the fact that they were not delivered to the persons addressed" (R. 103; 103 Fed. Supp. (2d) 451).

(The above quoted statement by the Circuit Court of

Appeals, to the effect that it is not claimed that the postmaster "had any knowledge of the fraud that was being perpetrated by Hunting," should be qualified, as shown by part of Judge Nordbye's opinion quoted below, by stating that the testimony did not *directly* "establish that Malone was knowingly a party to the fraud." The Record does not negative a finding by the jury, on competent *circumstantial* evidence, that the postmaster did know of the fraud that was being perpetrated upon plaintiff.)

The facts, as above summarized by the Circuit Court of Appeals, were amplified, and some additional material facts stated, in the opinion of Judge Nordbye, who tried the case in the District Court (R. 70-72; 23 Fed. Supp. 412-413). As shown by Judge Nordbye's statement of the facts, plaintiff, in addition to sending letters to the fictitious conditional buyers of cars, sent through the mails books for the recording of payments, insurance certificates, and receipts for payments ostensibly made by such buyers but actually made by Hunting. Judge Nordbye found:

> "By reason of the arrangement between Hunting and the defendant Malone, the correspondence, inquiries, etc., did not reach the persons to whom the letters were addressed, but were received by Hunting instead, and in this manner he was able to dupe the plaintiff for a long period of time. * * * The evidence fairly established that plaintiff honestly believed that the contracts were *bona fide*, and also believed that the replies that it received from various credit references were genuine. It believed and relied upon the integrity of the United States mails and honestly assumed that the various mail matter addressed in connection with the contracts that it had purchased was being delivered to the persons to whom such mail matter was addressed. The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not directly estab-

lish that Malone was knowingly a party to the fraud. Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to convince Malone that it was perfectly proper for the 'Midland mail' to be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, *contrary to the Postal Laws and Regulations*, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict" (R. 72; 23 Fed. Supp. 412-413). (Italics supplied.)

Condition of Bond.

The bond here involved was given in the sum of $16,000 and conditioned

"That * * * Malone * * * faithfully discharge all duties and trusts imposed upon him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System" (R. 19).

Statutes Involved.

39 *U. S. C. A.*, Sec. 34: "'Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the

Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department. * * * The bond of any married woman who may be appointed postmaster shall be binding upon her and her sureties, and she shall be liable for misconduct in office as if she were sole." (The last sentence is here important only as use of the phrase, "misconduct in office," may be deemed to throw light on the phrase in the first sentence, "faithful discharge of all duties and trusts imposed * * * by law or the rules and regulations of the department.")

5 *U. S. C. A.*, Sec. 377: "All bonds taken * * * by the Post Office Department shall be made to and with the United States of America."

Regulations Violated by Postmaster.

That the postmaster did not faithfully discharge the duties and trusts imposed upon him by regulations of the department is manifest upon a comparison of the facts found by the lower courts with the Postal Regulations.

Duties imposed upon postmasters by Postal Regulations (1932) and obviously for the principal if not sole benefit of users of the mails—are imposed as follows: Sec. 702, par. 1, prohibiting postmasters to "give to unauthorized persons information concerning mail matter," or to withhold delivery of mail to the addressees (R. 11). Sec. 703, pars. 1, 2, forbidding postmasters to "permit to have access to any mail matter in the post office any persons except sworn assistants," etc. (R. 11-12). Sec. 775, par. 1, requiring letters addressed to fictitious persons, without specific address, to be sent to the Division of Dead Letters unless the envelope contains the card of the sender, in which latter case return must be made to the sender (R. 12). (Plaintiff's return

card was on all envelopes sent through the Montgomery post office (R. 8).) Sec. 777, par. 1, requiring mail matter to be delivered to the addressee or to his written order (R. 12-13).

Government's Relation to Bond.

There is no contention on the part of the Government or the surety that the Government or any one other than plaintiff asserts any claim against the bond here involved, or that potential claims against it exist. The bond was supplanted by a new one given when defendant Malone was elevated from acting postmaster to postmaster (R. 84). Plaintiff's claim and rights arise under the superseded bond only.

Reference is made in the opinions of both of the lower courts to the fact that administrative officers of the United States did not consent to the bringing of this action (R. 84, 23 Fed. Supp. 419; R. 102; 103 Fed. (2d) 450). By this is meant consent of the Attorney General, as distinguished from the point whether or not the Congress has manifested intention that a private person may sue on a postmaster's bond. With all respect for the opinions of the lower courts, we believe that it is the intention of Congress that is here controlling. But, because the absence of the Attorney General's consent was considered by the lower courts, it is important that his position be here understood. In a letter to counsel for plaintiff, dated September 22, 1936, the Department of Justice said, with respect to consent to bringing of suit in the name of the United States:

> "This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as stated by you, the claim is the exclusive property of your client. The bond of the Acting Postmaster was executed in accordance with the provisions of R. S. 3834, as amended, U. S. C., Title 39, Section 34. Whether the sureties on a bond executed in accordance with the provisions of this section are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General."
>
> "In the circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it" (R. 58-59).

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The discretionary power of this Court is invoked upon the following grounds:

1. The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

The importance of the questions whether a postmaster's bond extends to the benefit of private mail-users, and, if so, whether they have a right to sue on the bond in the name of the United States is obvious. That neither of these questions has been decided by this Court is undisputed, excepting as the principles laid down in *Howard vs. United States*, 184 U. S. 676, require a decision in our favor. If the Circuit Court of Appeals did not err in holding that the *Howard Case* is distinguishable, then there is no decision of this Court nor of any other federal court, on the right of a private mail-user to sue on a postmaster's bond, excepting the decisions of the lower courts in the case at bar. The only

other decisions on that point were rendered by state courts as follows:

Idaho Gold Reduction Co. vs. Croghan, 6 Idaho 471.

United States vs. Griswold, 6 Ariz. 453 (dictum).

2. The Circuit Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court, including, among others:

Howard vs. United States, 184 U. S. 676, which holds that an official bond of a federal court clerk, given under a closely resembling statute and containing closely resembling conditions, could be sued on by a private person, in the name of the United States, although the United States was the only obligee named in the bond.

Teal vs. Felton, 12 How. 284, which holds that a postmaster's wrongful withholding of mail matter from the addressee is a conversion for which the addressee can sue the postmaster.

Crooks vs. Harrelson, 282 U. S. 55, 60, which holds that the letter of an act of Congress is controlling unless a contrary intention is plainly manifested.

Smith vs. United States, 170 U. S. 372, 381, which holds that fair protection of those dealing with a bonded Government official should not be defeated through "any refined reasoning."

New Jersey Steam Nav. Co. vs. Boston Merchants Bank, 6 How. 344, which holds that a bailor has a right to sue on a contract between the bailee and a third person concerning the bailed property.

3. The decision of the Circuit Court of Appeals is in conflict with decisions of other circuit courts of appeals on the same matter, including, among others, the following decisions:

United States vs. American Surety Co. (C. C. A. 4), 163 Fed. 228.

Gibson vs. United States (C. C. A. 1), 208 Fed. 534.

United States Fidelity & Guaranty Co. vs. United States (C. C. A. 9), 246 Fed. 433.

Massachusetts Bonding & Ins. Co. vs. United States (C. C. A. 7), 54 Fed. (2d) 1039.

United States vs. Abeel (C. C. A. 5), 174 Fed. 12.

United States vs. United States Fidelity & Guaranty Co. (C. C. A. 6), 247 Fed. 16.

American Surety Co. vs. United States (C. C. A. 5), 133 Fed. 1019.

23 *Opinions, Attorneys General*, 476, 479,

Which cited decisions establish coverage under bonds similar to the one here involved for the benefit of private persons?

4. The decision of the Circuit Court of Appeals is in conflict with its own decisions in the following cited cases, among others:

Bosler vs. United States (C. C. A. 8), 26 Fed. (2d) 4.

Howard vs. United States (C. C. A. 8), 102 Fed. 77.

National Surety Co. vs. United States (C. C. A. 8), 129 Fed. 70,

Which cited decisions established the right to private benefits under bonds running to the United States.

Complying with the rule of this Court, requiring that all issues upon which decision is requested be presented in a petition for certiorari, we have herein presented and outlined those issues, in the statement of our reasons for allowance of the writ; but, in attempting the brevity of statement required by Rule 38, par. 2, we have not set forth all of

the points, nor all of the contentions in support thereof, that will be urged at the argument on the merits of this cause in the ewent that the writ prayed for shall be granted. Petitioner here refers to and incorporates into this petition, by reference, all of the matters presented in the petition for rehearing filed below (R. 110-113), and in the proposed assignments of error contained in the brief accompanying this petition with the same force and effect as if herein set out in full.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated July 24, 1939.

BENEDICT DEINARD,
1036 Andrus Building,
Minneapolis, Minnesota,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Petitioner (Plaintiff-Appellant below),

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE,

Respondents (Defendants-Appellees below),

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (May 16, 1938) is reported at 23 Federal Supplement 411-420, and the opinion of the Circuit Court of Appeals (April 21, 1939) is reported at 103 Federal Reporter (2d) 450-453.

JURISDICTION OF THIS COURT.

The judgment of the Circuit Court of Appeals was entered April 24, 1939 (R. 107-108). Petition for re-hearing, seasonably filed in the Circuit Court of Appeals, was denied May 10, 1939 (R. 115).

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925, Ch. 229, Sec. 1 (43 Stat. 938; 28 *U. S. C. A.*, Sec. 347).

Statement of the specific claims advanced, and rulings made, in the lower court which are relied upon as a basis of this Court's jurisdiction, and of the cases believed to sustain the jurisdiction, are set forth in the foregoing petition, under the head of "Questions Presented" and "Reasons Relied on for Allowance of the Writ." For brevity's sake we adopt that statement as a part of this Brief by reference.

STATEMENT OF THE CASE.

The facts, so far as material to the questions presented, have been stated in the foregoing petition. To avoid considerable repetition, the statement of the case, as presented in the petition, under the head, "Summary and Short Statement of the Matter Involved," including sub-captions thereunder, is hereby adopted as a part of this Brief.

SPECIFICATION OF ERRORS ASSIGNED.

The errors which the petitioner will urge, if the writ of certiorari prayed for be granted, are that the Circuit Court of Appeals erred:

1. In holding that but a single question was presented to the Court, and that that question was whether a mail-sender could sue on a postmaster's bond, without the consent of the Government, for unauthorized delivery of the mail to one other than the addressee (R. 102; 103 Fed. (2d) 450), because the principal question presented to the Court was whether or not the statute requiring the bond permits

a mail-user to sue on such bond without any further consent of the Government than appears by legal intendment in that statute.

2. In holding that it was not claimed that the defendant postmaster "had any knowledge of the fraud that was being perpetrated by Hunting"—the person to whom the mail was unauthorizedly delivered (R. 103; 103 Fed. (2d) 451), because the Record shows that it was merely found in the trial court that, although the testimony indicated that the postmaster knew of Hunting's business relations with plaintiff, it did not *directly* establish that Malone was knowingly a party to the fraud (R. 72) and because the evidence does not negative a finding by the jury on competent *circumstantial* evidence that the postmaster did know of the fraud that was being perpetrated upon plaintiff.

3. In holding that regulations of the Post Office Department may be considered in determining whether or not 39 *U. S. C. A.*, Sec. 34, manifests intention of Congress that mail-users should be protected by a postmaster's bond (R. 106; 103 Fed. (2d) 452).

4. In holding that no inference may be drawn from 39 *U. S. C. A.*, Sec. 34, and related statutes that Congress intended to extend the protection of the bond to private mail-users (R. 106; 103 Fed. (2d) 452).

5. In holding that the decisions of this Court and other authorities cited by plaintiff "fall far short of establishing the proposition that the bond in suit was required for the direct benefit of private mail-users, or that a legal intendment permitting them to sue on the bond should be read into the statute" (R. 106; 103 Fed. (2d) 452).

6. In refusing to hold that, even if the "primary" or

"dominant" purpose of 39 *U. S. C. A.*, Sec. 34, in requiring bonds of postmasters be deemed to be the protection of the Government in its fiscal and other relations with the postmasters, plaintiff is nevertheless entitled to recover as a "secondary" beneficiary of the bond, because the Government has no actual or potential claim against the bond.

7. In affirming the judgment of the District Court (R. 107-108); such judgment not being supported by the law or the evidence and being contrary thereto.

8. In deciding that plaintiff is not entitled to recover, such decision being contrary to the law and the evidence.

9. In holding that the Court's conclusions were not inconsistent with those decisions in which the Government in actions brought by it upon similar bonds has recovered for theft of letters and the like, irrespective of the Government's liability to the mail-user (R. 106-107; 103 Fed. (2d) 452-453).

SUMMARY OF ARGUMENT.

The points hereinafter argued follow the reasons relied upon in the petition for allowance of the writ, and, for brevity's sake, are not here repeated.

ARGUMENT.

I.

The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

Although this Court has never determined the question whether or not suit can be brought by, or on behalf of, a private mail-user on a postmaster's bond on account of a breach of official duty toward the mail-user, we have consistently urged throughout this litigation, and still assert, that the question is virtually answered by the decision in *Howard vs. United States*, 184 U. S. 676. There is no essential difference in the facts of the two cases, nor in the statutes involved, excepting as an essential difference be deemed to arise from the circumstance that, in the *Howard Case*, the bond given for faithful performance of official duties was given by a clerk of a federal court, whereas the bond here involved was given by a postmaster.

If the last mentioned circumstance is, and we claim it is, unessential—if there is an analogy between the dual relationship of a federal court clerk to private litigants and to the Government, on one hand, and the dual relationship of a postmaster to private mail-users and to the Government—then the decision of the Circuit Court of Appeals is erroneous, and the judgment appealed from should be reversed. If, on the other hand, that Court was right in holding that the *Howard Case* is distinguishable, on the ground of a lack of analogy in the relationship of federal court clerks and postmasters to private persons, then the highly important questions of federal law whether or not a private mail-user is a beneficiary of a postmaster's bond, and has a right to

sue thereon in the name of the United States and for his own benefit are indisputably questions that have not yet been settled by this Court. That the question should be settled by this Court is a self-evident proposition.

Neither of the lower courts and neither of the defendants have claimed that the question has been settled by this Court. The position of the Circuit Court of Appeals as to supporting adjudications on the precise questions is limited to decisions of the supreme courts of Idaho and Arizona. The Court says:

> "Support for these conclusions will be found in *Idaho Gold Reduction Co. vs. Croghan*, 6 Idaho 471, 56 P. 164; *United States vs. Griswold*, 8 Ariz. 453, 76 P. 596; 49 *C. J.* 1455."

The gist of the decision in the *Idaho Gold Reduction Case, supra*, was that a private party could not sue on a postmaster's bond in the absence of a statute permitting it, and that the Court knew of no such statute.

When *Howard vs. United States*, 184 U. S. 676, was before this Court plaintiffs in error in that case cited the *Idaho Gold Reduction Co. Case* as supporting a contention that an official bond must be deemed to be for the sole benefit of the governmental agency requiring it, in the absence of a statute expressly giving a right of action to individuals (see 46 L. Ed. 754, 2d col.). Having reached a conclusion contrary to that contention, it is perhaps not strange that this Court did not mention the Idaho case in its opinion. In any event, neither this Court nor any other federal court has sanctioned the doctrine of the Idaho case, excepting the sanction given by the courts below in the case at bar.

Furthermore, the opinion of the Idaho court indicates that the decisive factor in the case was probably the facts that

there was nothing in the record to show to whom the bond was given, excepting as that could be inferred from the federal statutes, and that there was no showing as to what were the conditions of the bond there sued on.

As to the Arizona case, *United States vs. Griswold, supra*, we believe that the Circuit Court of Appeals misconceived the force and effect of that decision. The action in that case was brought by the Government itself for the benefit of the sender of a registered letter. Therefore, the statement by the Arizona Supreme Court in that case that the senders could not maintain a suit on the postmaster's bond in their own name to recover for the loss of the registered package was dictum. (It will be noted that the Court does not go so far as to say that a sender could not sue in the name of the United States.) Apparently, this dictum has never been approved by any federal court, excepting by the courts below in the case at bar.

Disregarding the Arizona court's dictum on the question of *remedial* right, it will be noted that the opinion supports our position—and is opposed to the conclusions reached by the Circuit Court of Appeals—on the substantive question as to whether or not mail-users are beneficiaries of postmasters' bonds. The Court distinctly held that a postmaster's bond to faithfully discharge his duties is violated by misconduct of a postmaster toward a sender of mail. In that respect the Arizona decision is in line with this Court's holding in the *Howard Case* that a similar bond extended to the benefit of private persons as well as the Government. But the dictum as to the right of such persons to sue to enforce that benefit is directly opposed to this Court's further holding in the *Howard Case* that the right to sue followed by legal intendment.

As to the Circuit Court of Appeals' citation to 49 *C. J.*

1455—probably intended to refer to 49 *C. J.* 1147, Sec. 56—the statement in the text that "it is well settled that, in the absence of special statutory authorization, a private person cannot sue on a postmaster's official bond for money coming into his hands in his official capacity and lost through his negligence or default," is supported only by citation of the decisions in the Idaho and Arizona cases above cited, and is directly opposed to the decision of this Court in the *Howard Case*, to the effect that legal intendment is a substitute for "special statutory authorization."

Although this Court decided in *Teal vs. Felton*, 12 How. 284, that the wrongful withholding of mail matter by a postmaster from an addressee was a conversion for which the addressee might sue the postmaster, no claim has been made by counsel for any of the parties to this action or by either of the lower courts that this Court has ever passed on the question here presented, as to coverage of a postmaster's bond. All that has been claimed is that the decisions in the following cited cases bear analogies to the case at bar:

Howard vs. United States, 184 U. S. 676.

Washington vs. Young, 10 Wheat. 404, distinguished in the *Howard Case*.

Munroe vs. Raphael, 288 U. S. 485.

II.

The Circuit Court of Appeals Has Decided a Federal Question in a Way That Conflicts With Applicable Decisions of This Court.

The decision of the Circuit Court of Appeals, that the bond sued on was not required for the direct benefit of private mail-users, and that no legal intendment permitting them to sue should be read into the statute (R. 106; 103 Fed. (2d) 452) is in conflict with this Court's decision in *Howard vs. United States*, 184 U. S. 676.

In the *Howard Case*, as here, a statute required a federal administrative official—a federal court clerk—to give a bond naming the United States as obligee, without any specification as to who should be beneficiaries of the bond. There, as here, the condition of the bond was for the faithful performance of official duties. The essential requirement of the statute involved in the *Howard Case* was that a federal court clerk give a bond "faithfully to discharge the duties of his office," etc. (184 U. S. 681-682). The essential requirement of 39 *U. S. C. A.*, Sec. 34, is that every postmaster give a bond for the "faithful discharge of *all* duties and trusts imposed on him either by law or the rules and regulations of the department," etc. (Italics supplied.) The bond in the *Howard Case* was in the penal sum of $20,000 (184 U. S. 677) under a statute which did not permit requirement of a bond in a greater sum than $40,000. The $16,000 bond here involved was given under a statute that imposed no limit on the penalty that might be exacted (39 *U. S. C. A.*, Sec. 34).

In the *Howard Case* it was argued by defendants "that, the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the

Government," and that no suit could be brought on it for the benefit of a private person (184 U. S. 687). The Circuit Court of Appeals takes the same position as to the bond here involved (R. 106; 103 Fed. (2d) 452).

This Court decided in the *Howard Case* that Congress "intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to $40,000" (184 U. S. 687).

In the *Howard Case* it was further contended that, "even if the bond was for the protection of individual litigants, it could not be put in suit by a private person, unless with the consent of the United States expressed in an act of Congress" (184 U. S. 690). This Court decided that "Congress intended that the required bond should protect private suitors as well as the United States, and, therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be the legal intendment of existing statutory provisions" (184 U. S. 692).

In the case at bar the Circuit Court of Appeals seems to recognize that the decision in the *Howard Case* is here controlling excepting as there is such difference in the relationship of federal court clerks and of postmasters to private persons dealing with them as to justify a holding that Congress did not intend that users of the mails should be benefited by postmasters' bonds (R. 106; 103 Fed. (2d) 452). The Circuit Court of Appeals does not attempt to distinguish the *Howard Case* on the ground of an essential difference in statutory provisions. Its position is thus stated, in commenting on the *Howard Case:*

> "We are urged to find a similar legal intendment in the statute under which the bond in suit was taken. In this connection it is said that the letter of the statute

confers benefits upon users of the mails as well as upon the Government; that the postal regulations relating to the safe conduct of the mail are primarily for their benefit, and that the situation is similar to that in the Howard Case in that the principal purpose of the postal system is to transmit private mail" (R. 106; 103 Fed. (2d) 452).

Without questioning the soundness of the considerations thus summarized, the decision of the Circuit Court of Appeals continues:

"We are of the opinion, however, that these considerations are outweighed by the fact that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond primarily for the Government's protection. * * * The related statutes and postal regulations all point to this conclusion. No inference may be drawn from them that Congress intended to extend the protection of the bond to private mail-users" (R. 106; 103 Fed. (2d) 452).

Thus it will be seen that the Circuit Court of Appeals first assumes that the postmaster's bond statute is for the *primary* benefit of the Government, which position would still entitle plaintiff to recover in this case, as a *secondary* beneficiary, because there is no contention in this case, either on the part of the Government or the Surety, that the Government or anyone else asserts any claim against the bond here involved, or that potential claims against it exist (R. 84). Therefore, the question whether plaintiff could have exhausted the bond to the prejudice of the Government or anyone else is here moot, and, obviously, a final decision in this case could be so framed as to avoid its being regarded as a precedent on that point.

But, as above noted, the Circuit Court of Appeals finally

narrowed its position as to a postmaster's bond being for the *primary* benefit of the Government, by virtually holding that the bond is for the *sole* benefit of the Government, for the opinion says that "no inference may be drawn * * * that Congress intended to extend the protection of the bond to private mail-users." We respectfully submit that that position conflicts with this Court's holding in the *Howard Case*.

In view of the analogies between the statutes and bonds involved in the *Howard Case* and those here involved, the holding of the Circuit Court of Appeals, that no inference may be drawn "that Congress intended to extend the protection of the bond to private mail-users," is in conflict with the declaration made by this Court in the *Howard Case:* "Surely, it cannot be said that it appears by the statutes and by the bond in the present case that it was given for the sole use of the United States" (184 U. S. 689).

The Circuit Court of Appeals holds that the "related statutes and postal regulations all point to this conclusion"—that Congress intended primarily to protect the Government (R. 106; 103 Fed. (2d) 452). As to postal regulations, we respectfully submit that they cannot be properly considered as diminishing the effect of the postmaster's bond statute. Under 5 *U. S. C. A.*, Sec. 22, departmental regulations must be consistent with acts of Congress. This statute delegates no legislative power to a department. (*Butler vs. White* (C. C., W. Va.) 83 Fed. 578—reversed on other grounds, *White vs. Butler*, 171 U. S. 379.)

As to the only related statutes cited by the Circuit Court of Appeals (R. 106; 103 Fed. (2d) 451), 5 *U. S. C. A.*, Sec. 377, requiring bonds taken by the Post Office Department to run to the United States, presents no situation that differs from the situation in the *Howard Case*. There, too, the bond was required to run to the United States (184 U. S. 682).

Nor does the requirement of 28 *U. S. C. A.*, Sec. 732, that all suits arising under the postal laws shall be brought *in the name of the United States*, run counter to the decision in the *Howard Case* that suit may be brought in the name of the United States by one benefited by a bond given to the United States.

The decision of the Circuit Court of Appeals, to the effect that the letter of the postmaster's bond statute is to yield to a conception that when Congress required a bond to secure faithful discharge of *all duties* imposed on the postmaster by law and regulations it meant only duties to the Government and not duties imposed by regulations in favor of mail-users, is in conflict with the decision of this Court in *Crooks vs. Harrelson*, 282 U. S. 55, 60, where it was decided: "And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail."

In this connection it is to be noted that there is a conflict between the position taken by the Circuit Court of Appeals in the case at bar, and the position that it took in the *Howard Case*, under the affirming approval of this Court. There the Circuit Court of Appeals said:

> "If the statute was made to express the construction contended for, the condition would read, 'faithfully to discharge the duties of his office so far forth as they concern the United States only, * * *.' Obviously, the court cannot ingraft any such limitations on the conditions of the bond" (*Howard vs. United States*, 102 Fed. 77, 80).

The decision of the Circuit Court of Appeals is also in conflict with the decision of this Court in *Smith vs. United States*, 170 U. S. 372, 381, to the effect that fair protection of those dealing with a bonded Government official should not be defeated through "any refined reasoning."

The decision of the Circuit Court of Appeals that Congress did not intend to extend the protection of the bond to private mail-users—although the statute requires a bond to secure faithful performance of all duties imposed upon the postmaster by the laws and postal regulations—is in conflict with the decision of this Court in *Teal vs. Felton*, 12 How. 284, 13 L. Ed. 990, holding that wrongful withholding of mail matter by a postmaster from an addressee was an actionable conversion.

That the Circuit Court of Appeals confuses the right of one indirectly benefited by a *contract* to sue on it in his own name and the right of a beneficiary of an *official bond* to sue, as in this case, is shown by *United States vs. United States Lines Co.* (D. C., S. D., N. Y.), 24 Fed. Supp. 427, 429, which the Circuit Court of Appeals cites as supporting its conclusions. In holding that mail senders could not sue on a *contract* between the Government and a steamship company for the carriage of mails, the Court in the cited case thus distinguished the *Howard Case*, *supra*, *United States vs. Globe Indemnity Co.* (C. C. A. 2), 26 Fed. (2d) 191, and *United States vs. Massachusetts Bonding & Ins. Co.*, 238 N. Y. 334, 144 N. E. 631, by saying:

> "However, each of these suits was upon a bond which had been posted to secure faithful performance of his duties by a certain individual occupying a public or quasi public position. The bonds were required by statute and were intended for the benefit of members of the public who would have dealings with the one who was bonded. Those cases, involving suits on bonds, are not persuasive here."

The Court drew special attention to the discussion in the *Howard Case*, concerning an express or *implied* "right to sue given to the persons who are protected by the bond."

III.

The Decision of the Circuit Court of Appeals Is in Conflict With Decisions of Other Circuit Courts of Appeals on the Same Matter.

We believe that the Circuit Court of Appeals erred when it decided:

> "These conclusions" — conclusions that a postmaster's bond was not intended by Congress to extend to the protection of private mail-users, and that no legal intendment, permitting them to sue on the bond, could be inferred—"are not inconsistent with those decisions in which the Government in actions brought in the name of the United States upon similar bonds has recovered for the theft of registered letters and the like, even in the absence of the assertion of a claim by the sender or proof of loss to the Government other than the interference with its special property right as a bailee." (R. 106-107; 103 Fed. (2d) 452-453).

If, as decided by the Circuit Court of Appeals, the indications are that "the statute requires a bond primarily *for the Government's protection*" (italics supplied) and will sustain no inference "that Congress intended to extend the protection of the bond to private mail-users" (R. 106; 103 Fed. (2d) 452), how could a surety be held liable on such a bond for loss of a private mail-user—for which the Government is not liable—whether the suit be brought by the mail-user or by the Government? Does not the Court overlook the basic point that the question of extent of coverage of a postmaster's bond is a matter of *substantive* law, and that if the bond covers private mail-users, the decision in *Howard vs. United States*, 184 U. S. 676, conclusively settles plaintiff's right to sue in the name of the United States?

This Court said in the *Howard Case*:

> "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and *therefore*, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States". (184 U. S. 692). (Italics supplied.)

The Circuit Court of Appeals itself recognized in *Federal Surety Co. vs. Minneapolis Steel & Machinery Co.*, 17 Fed. (2d) 242, 244, that while the right of a third party to sue on an obligation "is in a sense remedial, * * * the right to sue depends upon the substantive right of such third party under the contract."

The question presented under this particular head is whether or not the decision of the Circuit Court of Appeals is in conflict with decisions of other circuits on the substantive point as to private persons being protected by a postmaster's bond:

United States vs. American Surety Co. (C. C. A. 4), 163 Fed. 228.

Gibson vs. United States (C. C. A. 1), 208 Fed. 534.

United States Fidelity & Guaranty Co. vs. United States (C. C. A. 9), 246 Fed. 433.

(The three cases last cited are ones which the Circuit Court of Appeals finds not to be in conflict with its decision in the case at bar.)

In *United States vs. American Surety Co., supra*, a railway postal clerk's bond was conditioned substantially the same as the bond here involved, that is, to "faithfully discharge all the duties and trusts imposed on him * * * either by law or the rules and regulations of the Post Office Department.". The Government sued on the bond because

the clerk had rifled *unregistered* mail matter of its contents. The Court overruled a defense that because the Government was under no liability to the senders it could not recover on the bond (163 Fed. 231). Obviously, if the bond did not cover the senders' losses the Government would have had no standing to sue on the bond.

Gibson vs. United States, supra, was an action on a postmaster's bond. Holding that the bond, conditioned substantially the same as the one at bar, covered losses by senders of mail, *regardless of the Government's liability to the senders*, the Court said:

> "Should the government be allowed so to recover, it would hold the amount recovered upon an implied trust for the owners of the property. *To allow such a recovery would not, in our opinion, be holding the sureties to any liability not clearly within the reasonable contemplation and the intention of the parties when the bond was given.*" (Italics supplied.)

Although the action in the cited case was brought by the Government, the Court did not exclude the right of the senders to sue on the bond. The Court said:

> "Whether the owners of the letters could have sued either in their own names or in that of the United States, as in *Howard vs. U. S.*, 184 U. S. 676, * * * need not be considered" (208 Fed. 537).

In *United States Fidelity & Guaranty Co. vs. United States, supra*, it was decided that the Government could recover on a postal employee's bond the full amount of a private loss caused by default under his bond, although that was in excess of the amount of the Government's liability to the party sustaining the loss. The Court approved the statement of the Circuit Court of Appeals, Fourth Circuit, in *United States vs. Atlantic Coast Line R. Co.*, 215 Fed.

56, 59, where that Court said, with its own italicized emphasis:

> "The government could also recover the value of the mail lost for the benefit of the owners of the mail, *provided the contract did not negative the idea of liability extending that far.*"

The holding of the Circuit Court of Appeals, that the statute requiring postmasters to give bonds, and related statutes and postal regulations, do not permit an inference "that Congress intended to extend the protection of the bond to private mail-users" (R. 106; 103 Fed. (2d) 452) is in conflict with the decision rendered by the Circuit Court of Appeals, Seventh Circuit, in *Massachusetts Bonding & Ins. Co. vs. United States*, 54 Fed. (2d) 1039, 1040-1041. In that case the Court recognized that there is a natural basis for interpreting postal laws and regulations as protecting users of the mails, saying: "One using the mail has no voice in the appointment of the post office force, and no control over the handling of the mail received by the department. * * * The user of the mails can do nothing but deliver his mail to the post office."

The decision of the Circuit Court of Appeals that "The indirect benefit to the plaintiff, if the Government may maintain such an action in its interest, does not justify the present suit" (R. 107; 103 Fed. (2d) 452) is in conflict with *United States vs. Abeel* (C. C. A. 5), 174 Fed. 12. That case is on all fours with *Howard vs. United States*, 184 U. S. 676, in that it was an action on a federal court clerk's bond for misappropriating money belonging to private parties. The only difference between those two cases lay in the fact that it was the Government that sued on the bond in the *Abeel Case*. Holding that suit could be brought, in the alternative, by the Government or by the aggrieved private

parties in the name of the United States, the Circuit Court of Appeals for the Fifth Circuit said:

> "Unquestionably one entitled to a part of the fund in the hands of the clerk could sustain a suit on the clerk's bond in the name of the United States. *Howard vs. United States, supra.* But it by no means follows that on the facts stated in the petition a suit cannot be maintained by the United States without a statement that the suit is for the use of someone named in the petition."

The decision of the Circuit Court of Appeals is in conflict with *United States vs. United States Fidelity & Guaranty Co.* (C. C. A. 6), 247 Fed. 16, where it was held that the amount that the Government had paid the owner of a registered package that had been pilfered by a postal employee did not limit the amount that the Government could recover on the employee's bond. The Court said that the Government would hold the excess recovery, "upon a trust for the benefit of its injured patron. This right of recovery is rested, not only on the legal right of an ordinary bailee for hire to recover the full value of the subject of the bailment from one who has wrongfully converted it, but upon the right of the United States, as *parens patriae*, and upon principles of public policy, in the performance of its moral duty to protect the patrons of its post office establishment against theft by its unfaithful employees" (247 Fed. 18).

The decision of the Circuit Court of Appeals is in conflict with *American Surety Co. vs. United States* (C. C. A. 5), 133 Fed. 1019, a case decided in a memorandum opinion based upon the decision in *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, and upon 23 *Opinions, Attorneys General*, 476, 479. We quote from the latter, which seems to have had under consideration the bond of a postal employee resembling in its condition the bond at bar:

"* * * The contract is not one of strict narrow indemnity, and whether it is called one of suretyship or fidelity insurance, its meaning and purpose are clear, viz., to assure the faithful performance of all the employee's duties, and the result, to a plain understanding, is the assumption by the obligor of liability for the consequences of all failures of the principal to perform his obligations up to the principal sum named in the bond."

IV.

The Decision of the Circuit Court of Appeals Is in Conflict With Its Own Decisions on the Same Matter in Cases Cited Below.

The decision of the Circuit Court of Appeals, to the effect that an action by the Government and an action by a private beneficiary of a postmaster's bond are not alternative remedies conflicts with the Court's own decision in *Bosler vs. United States*, 26 Fed. (2d) 4. There the action was on the bond of a depository in bankruptcy given to the United States under U. S. C. A., Tit. 11, Sec. 101, as that statute was worded prior to its amendment June 22, 1938. The Court said (p. 8):

> "In view of the foregoing considerations, our conclusion is that the suit was properly brought in the name of the United States. In this holding, however, we do not mean to be understood as deciding that the suit might not be brought by one or more of the creditors in the name of the United States. See *Howard vs. United States*, 184 U. S. 676, 22 S. Ct. 543, 46 L. Ed. 754; *United States vs. Abeel*, *supra*, page 19."

The decision of the Circuit Court of Appeals is also in conflict with its own decision in *Howard vs. United States*, 102 Fed. 77, in the following particulars: (1) In the *Howard*

Case, the Court gave controlling effect to the language of the statute requiring a bond, saying: "If the statute was made to express the construction contended for, the condition would read: 'faithfully to discharge the duties of his office so far forth as they concern the United States only, and seasonably to record the decrees, judgments, and determinations of the court in cases in which the United States only is interested.' Obviously, the court cannot ingraft any such limitations on the conditions of the bond" (102 Fed. 80). (2) The Court ruled in the *Howard Case* that the relator's right to sue in the name of the United States followed relator's beneficial interest in the bond (102 Fed. 84).

The decision of the Circuit Court of Appeals is in conflict with its decision in *National Surety Co. vs. United States*, 129 Fed. 70. In that case the Court said of a letter carrier's bond—worded essentially the same as the bond here involved:

> "But the contract of a surety, like all other contracts, must have a reasonable construction—an interpretation, which, while it carefully restricts his responsibility to that which he agreed to undertake, does not fail to hold him to that liability, which by the plain terms of the contract he agreed to assume. The surety in the case in hand agreed with the United States to be liable for the faithful discharge by its principal, Eich, of all the duties and trusts imposed upon him as a letter carrier either by the postal laws of the United States, or by the rules and regulations of the Post Office Department, etc."

CONCLUSION.

In whatever light the decision of the Circuit Court of Appeals be viewed, the petition for a writ should be granted. If the *Howard Case* controls, the decision is manifestly erroneous. If the *Howard Case* does not control, then the Circuit Court of Appeals has decided an important question

of federal law which has not been, but should be, settled by this Court.

The postal system is an enduring institution, for the primary benefit of every citizen. Malone's bond, conditioned as required by statute for the faithful performance of *all* of his official duties, no distinction being made between duties to the Government and duties to users of the mails, was an assurance to the latter that they would be protected against his wrongful act or omission, within the limits of the penal sum of the bond.

So far as the legal principles here involved are concerned, there is no essential difference between the relationship of a federal district clerk to private parties and the relationship of postmasters to private parties, excepting that postmasters have more intima and infinitely more frequent contact with users of the mail than court clerks have with private litigants. The facilities of a post office are used by all citizens, whereas but comparatively few citizens have occasion to resort to the courts. Therefore, we respectfully assert that there is no sound ground on which the holding in the *Howard Case* can be reconciled with the holding of the Circuit Court of Appeals in the case at bar, that a bond of a postmaster, worded essentially the same as that of a court clerk, does not operate to the benefit of users of the mails.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 236.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Petitioner,

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE,

Respondents.

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions below	1
Grounds of jurisdiction	1
Statement of the case	2
Explanatory note	2
Nature of the case	3
Ultimate questions presented	3
Statement of facts	4
Condition of bond	6
Bond statutes involved	6
Statutes concerning mail delivery	7
Departmental regulations involved	9
Government attitude toward suit	10
Proceedings in the case	12
Specification of errors assigned	14
Summary of argument	16
Argument	18
I. The Court of Appeals erroneously confused substantive and remedial rights and inaccurately summarized the issues	18
II. **Howard vs. United States**, 184 U. S. 676, covers all the principal issues	22
Detailed resemblances between the **Howard case** and this case	25
III. The letter of the bond statute benefits mail-users as well as the Government	28
III (a). The surety seeks judicial legislation	43
III (b). That the United States was the sole obligee named in the bond is not controlling	48
III (c). The statute permits a bond normally sufficient to cover both the Government and mail-users	54
III (d). Even if the bond primarily benefited the Government, that does not exclude plaintiff as a secondary beneficiary	58
III (e). Departmental regulations do not restrict bond coverage	61
IV. The bond coverage is as broad as the postmaster's liability in tort to mail-users	66
IV (a). The record shows that the postmaster became liable in tort	77
V. That postmasters are directly liable for their wrongs against mail-users is an old and well-established doctrine	79
American decisions	81
VI. The degree of the postmaster's culpability is unimportant	85
VII. The spirit as well as the letter of the statute benefits mail-users	93
VII (a). The spirit of the law is found in Congress having enacted what it should have enacted for the benefit of mail-users	96

VII (b). The spirit of the bond statute is found in the purpose for which the postal service primarily exists—the needs of the people 98
History of the postal system 99
Principal purpose of system 102
VII (c). A postmaster's principal duties run to mail-users, not to the Government 109
VIII. The decision of the Circuit Court of Appeals conflicts with a settled rule that the Government, as bailee, can recover on similar bonds, irrespective of its liability to the mail-user 119
IX. Plaintiff's right to sue in the name of the United States flows from its beneficial interest and omission by Congress to prescribe a different remedy 128
Surety's authorities discussed 139
IX. (a) Congress has prescribed no special or exclusive remedy, for the benefit of mail-users, on a postmaster's bond 147
That some statutes requiring bonds of other officials specify a remedy does not exclude a remedy in favor of mail-users 154
IX. (b). No departmental regulation prescribes, or could prescribe, an exclusive remedy on a postmaster's bond 158
X. The Attorney General's refusal to act does not defeat the suit 161
XI. The general rule, that the beneficiary of a contract can sue, applies 163
Conclusion 166

CASES CITED

American Bank Protection Co. vs. City National Bank (D. C., E. D., Tenn.), 203 Fed. 715 45
American Guaranty Co. vs. McNiece, 111 Ohio St. 532 ..... 72, 165
American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94 ..... 114, 134
American Surety Co. vs. United States (C. C. A. 5), 133 Fed. 1019 ..... 74, 106
Bainbridge vs. Postmaster General (1906), 1 K. B. 178, 75 L. J. K. B. 366 80
Barnes vs. Foley, 4 Burr. 2149, 5 Burr. 2711, 1 Wm. Bl. 643 80
Beebee vs. Robert (N. Y.), 12 Wend. 413, 27 Am. Dec. 132 127
Bell vs. Duffy (Victoria Sup. Ct., 1898), 4 Argus L. R. (Current No. 58) 57 81
Bevans vs. United States, 13 Wall. 56 41
Blackham vs. Gresham (C. C., S. D. N. Y.), 16 Fed. 609 106
Bosler vs. United States (C. C. A. 8), 26 Fed. (2d) 4 137
Boyden vs. United States, 13 Wall. 17 ..... 31, 42
Brady vs. Daly, 175 U. S. 148 151
Burkland vs. Bliss, 92 S. D. 91 52
Butler vs. White (C. C., W. Va.), 83 Fed. 578 159
Campbell vs. Galeno Chemical Co., 281 U. S. 599 63
Campbell vs. McPherson, 6 U. C. (O. S.) 34 80
Carey vs. Lawless, 13 U. C. Q. B. 285 80
Carlton vs. Detroit Fidelity & Surety Co., 112 Fla. 644 75
City of Beckley vs. Moran (C. C. A. 4), 61 Fed. (2d) 238 51
City of Cairo vs. Sheehan, 173 Ill. App. 464 53

Clark vs. United States, 60 Ga. 156 146
Coleman vs. Frazier, 4 Rich. (S. C.) 146 83
Commerford vs. Thompson (C. C., Ky.), 1 Fed. 417 ..... 46, 84, 87
County of Mower vs. American Bonding Co., 133 Minn. 274 71
Crooks vs. Harrelson, 282 U. S. 55 ..... 44, 93
Deal vs. United States (C. C. A. 9), 11 Fed. (2d) 3 39
District of Columbia vs. Fidelity & Deposit Co. (App. D. C.), 271 Fed. 383 51
Dr. David Kennedy Corp. vs. Kennedy, 165 N. Y. 353 116
Edwards vs. Dickenson, 12 Mod. 6 80
Etzler vs. Brown, 58 Fla. 221 69
Fayette Title & Trust Co. vs. Maryland, etc. (C. C., W. D., Pa.), 180 Fed. 928 72
Federal Surety Co. vs. Minneapolis Steel & Machinery Co. (C. C. A. 8), 17 Fed. (2d) 242 129
Finks, In re (D. C., W. D., Va.), 41 Fed. 383 68
Ford vs. Parker, 4 Oh. St. 576 84
Fosmire vs. National Surety Co., 229 N. Y. 44, 127 N. E. 472 144
Fosters vs. McKibben, 14 Pa. St. (2 Harris) 168 33
Gibson vs. United States (C. C. A. 1), 208 Fed. 534 ..... 73, 85, 123, 124
Goode vs. United States, 159 U. S. 663 88
Grady vs. United States (C. C. A. 8), 98 Fed. 238 ..... 30, 94
Griffith vs. W. S. Vick Grocery Co. (C. C. A. 6), 272 Fed. 246 ..... 2, 114, 148, 151, 160
Hall vs. Tierney, 83 Minn. 407 72
Harris vs. Hanson, 11 Maine 241 72
Hartman Ranch Co. vs. Associated Oil Co., 10 Cal. (2d) 232 60
Hedden vs. Roberts, 134 Mass. 38 118
Hollister vs. Hubbard, 11 S. D. 461 53
Hoover vs. McChesney (C. C., Ky.), 81 Fed. 472 ..... 101, 106
Howard vs. United States, 184 U. S. 676 ..... 2, 18, 22, 28, 48, 49, 50, 55, 66, 67, 74, 103, 109, 120, 126, 128, 129, 130, 132, 136, 139, 142, 143, 145, 146, 148, 149, 154, 156, 158, 163.
Howard vs. United States (C. C. A. 8), 102 Fed. 77, affirmed, 184 U. S. 676 ..... 29, 48, 94, 125, 130
Howard vs. United States (C. C. A. 7), 87 Fed. (2d) 243 90
Hurley vs. Olcott, 198 N. Y. 132 117
Hutchins vs. Brackett, 22 N. H. 248 81
Idaho Gold Reduction Co. vs. Croghan, 6 Ida. 471 139
Imperial Land Co., In re, L. R. 15 Eq. 18, 42 L. J. Ch. (N. S.) 372 119
Jackson, In re, 96 U. S. (6 Otto) 727 104
Jensen vs. McCorkell, 154 Pa. 323 118
Johnson vs. United States (C. C. A. 1), 163 Fed. 30 132
Jones vs. United States, 18 W. H. 662 92
Jos. Schlitz Brewing Co. vs. United States, 181 U. S. 584 45
Keenan vs. Southworth, 110 Mass. 474 83
Keifer & Keifer vs. Reconstruction Finance Corp., 83 L. Ed. 512 157
Ladew vs. Tennessee Copper Co. (D. C., S. D., Tenn.), 179 Fed. 245 45
Lammon vs. Feusier, 111 U. S. 17 155
Lane vs. Cotton, 1 Com. 100, 12 Mod. 47 (2 Mod. 108, 5 Mod. 455), 1 Salk. 17, 143, Carth. 487, Holt K. B. 582, 1 Ld. Raym. 646 81
Literary Recreations, Limited, vs. Sauve (B. C., 1932), 4 D. L. R. 553, 3 W. W. 123, 58 Can. C. C. 385 ..... 90, 107, 135
McNutt vs. Bland, 2 How. 9 133
Massachusetts Bonding & Ins. Co. vs. United States (C. C. A. 7), 54 Fed. (2d) 1039 ..... 96, 115, 122, 141
Meads vs. United States (C. C. A. 6), 81 Fed. 684 ..... 46, 64
Miller vs. Roby, 6 Neb. 471 69
Moody vs. Megee, 41 Fed. (2d) 515 67
Morrill vs. Jones, 106 U. S. 466 159

Myers vs. Bibee Grocery Co., 148 Va. 282 118
National Bank of Redemption vs. Rutledge (C. C., N. D., Ohio), 84 Fed. 400 ..... 29, 31, 76, 97
National Surety Corp. vs. Seward, 31 Ohio App. 206 75
National Surety Co. vs. State Savings Bank (C. C. A. 8), 156 Fed. 21 69
National Surety Co. vs. United States (C. C. A. 8), 129 Fed. 70 ..... 31, 72, 73, 74, 123, 124, 146
New Jersey Steam Navigation Co. vs. Boston Merchants Bank, 6 How. 344 ..... 121, 127
Ohio Casualty Ins. Co. vs. Beckwith (C. C. A. 5), 74 Fed. (2d) 75 ..... 60, 138, 164
Palmer vs. Massachusetts, 83 L. Ed. 8 44
Payne vs. Railway Pub. Co., 20 App. D. C. 581 (writ dismissed, 192 U. S. 601) 32, 46, 63, 114
People vs. Merscreau, 74 Mich. 687 72
People vs. Morgan, 188 Ill. App. 250 53
People vs. Schuyler, 4 N. Y. 173 72
Pierce vs. Chapman, 165 Miss. 749 71
Polk vs. Garrison, 162 Ark. 624 84
Postmaster vs. McColl, 31 U. C. C. P. R. 364 41
Postmaster General vs. Early, 12 Wheat. 136 166
Public Clearing House vs. Coyne, 194 U. S. 497 103
Pullman Car & Mfg. Corp. vs. Hamilton, 236 Ala. 209 77
Quimby vs. Adams, 11 Me. 332 30
Raisler vs. Oliver, 97 Ala. 710 84
Regina vs. McPherson (Can. C. C.), 15 U. C. C. P. 17 154
Richland County vs. American Surety Co., 92 S. C. 329 72
Robins Dry Dock & Repair Co. vs. Flint, 275 U. S. 303 164
Rose, The, 2 Wm. Rob. 1, 166 E. R. 656 115
Rosenthal vs. Walker, 111 U. S. 185 118
Rowning vs. Goodchild, 2 Wm. Bl. 906, 96 Reprint 536, 3 Wils. C. P. 443, 95 Reprint 1147 ..... 80, 113
St. Louis, I. M. & S. R. Co. vs. Taylor, 210 U. S. 281 45
Schroyer vs. Lynch, 8 Watts. (Pa.) 453 85
Scott vs. Feilschmidt, 191 Iowa 347 53
Selover vs. Sheardown, 73 Minn. 393 68
Seneca Independent School District vs. Traver, 63 S. D. 68 72
Skinner vs. Phillips, 4 Mass. 69 72
Smith vs. Dennis, or Dennison, Lofft 758 80
Smith vs. Powdich, 1 Cowp. 182 80
Smythe vs. United States, 188 U. S. 156 42
Southern Surety Co. vs. Bender, 41 Ohio App. 541 57
Spinney vs. United States, 32 Ct. Cl. 397 38
State vs. Alabama Power Co., 230 Ala. 515 38
State vs. Dahl, 150 Wis. 479 ..... 28, 38, 49, 132, 147, 163
State vs. Dyer, 67 Vt. 690 67
State vs. Examining and Trial Board, 43 Mont. 389 69
State vs. Glover, 115 Md. 250 51
State vs. McGuire, 46 W. Va. 328 77
State of Maryland vs. Baldwin, 112 U. S. 490 133
State vs. Nevin, 19 Nev. 162 38
State vs. Norwood, 12 Md. 177 50
State vs. United States F. & G. Co., 85 W. Va. 720 53
Stella B., The (D. C., E. D., N. Y.), 183 Fed. 507 ..... 152, 153
Stock vs. Harris, 5 Burr. 2709 80
Strong vs. Campbell, 11 Barb. (N. Y.) 135 34
Strunk vs. Ocheltree, 11 Iowa 158 71
Sweet vs. United States (C. C. A. 8), 228 Fed. 421 43
Taintor vs. Prendergast (N. Y.), 3 Hill 72, 38 Am. Dec. 618 127
Taylor vs. Shields, 183 Ky. 669 71
Teal vs. Felton, 12 How. 284 82

Tennessee Coal, etc., R. Co. vs. Roussell, 155 Ala. 435 68
Thunder Hawk School Dist. No. 8 vs. Western Surety Co., 58 S. D. 312 41
Title Guaranty & Surety Co. vs. State of Missouri (C. C. A. 8), 105 Fed. (2d) 496 29
Town of Lester vs. Trail, 85 W. Va. 386 53
United States vs. Abeel (C. C. A. 5), 174 Fed. 12 ..... 58, 136
United States vs. American Surety Co. (C. C., Md.), 161 Fed. 149. 124
United States vs. American Surety Co. (C. C. A. 4), 163 Fed. 228. 124
United States vs. Atlantic Coast Line R. Co. (C. C. A. 4), 215 Fed. 56 30
United States vs. Barker (C. C. A. 3), 100 Fed. 34 40
United States, to Use of Kinney, vs. Bell (C. C. A. 3), 135 Fed. 336 ..... 49, 135
United States vs. Bryan (C. C., N. D., Cal.), 82 Fed. 290, affirmed (C. C. A. 9), 90 Fed. 473 ..... 31, 43, 76
United States vs. Claypool (D. C., W. D., Mo.), 14 Fed. 127 35
United States vs. Delany (C. C., S. C.), 55 Fed. 475 88
United States vs. Fordyce (D. C., W. D., Ky.), 122 Fed. 962 42
United States vs. Globe Indemnity Co. (C. C. A. 2), 26 Fed. (2d) 191 ..... 19, 49, 146
United States vs. Griswold, 8 Ariz. 453 ..... 70, 74, 85, 96, 122, 142, 146
United States vs. Gruver (D. C., S. C.), 35 Fed. 59, 61 88
United States vs. Hall (C. C., E. D., Pa.), 26 Fed. Cas. No. 15,281. 106
United States vs. Hartford Accident & Indemnity Co. (D. C., Md.), 15 Fed. Supp. 791 150
United States vs. Howard, 184 U. S. 676 12
United States vs. Joles (D. C., Mass.), 251 Fed. 417 ..... 150, 152
United States vs. Kochersperger (C. C., E. D., Pa.), 29 Fed. Case No. 15,541 101
United States vs. Lachner, 134 U. S. 624 88
United States vs. Moore (C. C. A. 2), 168 Fed. 36 89
United States vs. Nutt (D. C., Ohio), Fed. Cas. No. 15,904 88
United States vs. Perkins (C. C. A. 8), 280 Fed. 546 90
United States vs. Rogde (D. C., S. D.), 214 Fed. 283 ..... 32, 70, 85
United States vs. Sander (C. C., N. D., Ohio), 6 McLean 598, Fed. Cas., No. 16,219 35
United States vs. United States Fidelity & Guaranty Co. (C. C. A. 6), 247 Fed. 16 125
United States vs. Ward (C. C. A. 8), 257 Fed. 372 ..... 29, 146
United States Fidelity & Guaranty Co. vs. United States (C. C. A. 8), 229 Fed. 397 123
United States Fidelity & Guaranty Co. vs. United States (C. C. A. 9), 246 Fed. 433 96
Walker Grain Co., In re (C. C. A. 5), 3 Fed. (2d) 872 50
Washington vs. Young, 10 Wheat. 406, 6 L. Ed. 352 142
Wentworth vs. Smith, 44 N. H. 419 83
Whitfield vs. Despencer (K. B.), 2 Cowp. 754 ..... 80, 97
Whittaker vs. United States Fidelity & Guaranty Co. (D. C., Mont.), 300 Fed. 129 72
Wile vs. United States Fidelity & Guaranty Co., 6 Alaska 48 141
Wilkinson vs. Walker (C. C. A. 5), 3 Fed. (2d) 872 2
Williams vs. Wells Fargo & Co. Express (C. C. A. 8), 177 Fed. 352 ..... 150, 151

STATUTES CITED

Page

5 U. S. C. A., Sec. 22 ..... 110, 158
5 U. S. C. A., Sec. 306 111
5 U. S. C. A., Sec. 317 111
5 U. S. C. A., Sec. 377 ..... 7, 109
5 U. S. C. A., Sec. 392 110
5 U. S. C. A., Sec. 485 111
6 U. S. C. A., Sec. 14 42
11 U. S. C. A., Sec. 101 137
18 U. S. C. A., Sec. 88 21
18 U. S. C. A., Sec. 315 ..... 8, 21, 112
18 U. S. C. A., Sec. 317 34
18 U. S. C. A., Sec. 318 ..... 8, 21, 35, 87, 88, 112
18 U. S. C. A., Sec. 324 ..... 8, 112
28 U. S. C. A., Sec. 347; Judicial Code, Sec. 240 (a), as amended by Act of Congress of Feb. 13, 1925, Ch. 229, Sec. 1; 43 Stat. 938 1
28 U. S. C. A., Sec. 496 ..... 155, 156
28 U. S. C. A., Sec. 500 ..... 155, 156
28 U. S. C. A., Sec. 513 52
28 U. S. C. A., Sec. 732 ..... 109, 150, 154, 158
31 U. S. C. A., Sec. 215 110
39 U. S. C. A., Sec. 4 ..... 111, 113
39 U. S. C. A., Sec. 7 111
39 U. S. C. A., Sec. 34 ..... 3, 6, 13, 15, 28, 54, 61, 67, 69, 93, 112, 131, 155
39 U. S. C. A., Sec. 35 109
39 U. S. C. A., Sec. 36 110
39 U. S. C. A., Sec. 37 110
39 U. S. C. A., Sec. 38 110
39 U. S. C. A., Sec. 40 110
39 U. S. C. A., Sec. 44 110
39 U. S. C. A., Sec. 158 113
39 U. S. C. A., Sec. 256 ..... 8, 112
39 U. S. C. A., Sec. 401 ..... 7, 111
39 U. S. C. A., Secs. 401-411 33
39 U. S. C. A., Sec. 406 7
39 U. S. C. A., Secs. 406-410 111
39 U. S. C. A., Sec. 407 79
39 U. S. C. A., Sec. 408 ..... 8, 34
39 U. S. C. A., Sec. 409 ..... 8, 10, 34, 112
39 U. S. C. A., Sec. 410 8
39 U. S. C. A., Sec. 790 110
39 U. S. C. A., Sec. 815 7

POSTAL REGULATIONS CITED

Page

(References to sections of Postal Laws and Regulations, 1932:)
Sec. 414 54
Secs. 701-832 10
Sec. 702 ..... 9, 35
Sec. 703 9
Secs. 722-723 ..... 9, 36
Sec. 723 7
Sec. 724 9
Secs. 729-730 9
Secs. 769-772 9
Sec. 775 ..... 9, 36
Sec. 776 36
Sec. 777 ..... 10, 36, 61, 62, 63, 65
Sec. 800 34
Secs. 804-805 10
Sec. 816 ..... 61, 149, 158
Sec. 826 7

CONSTITUTIONAL, ETC., PROVISIONS CITED

Constitution, Art. I, Sec. 8 ..... 98, 101
Articles of Confederation, Art. IX 101

OPINIONS OF ATTORNEYS GENERAL CITED

12 Op. Atty. Gen. 136 36
13 Op. Atty. Gen. 481 36
23 Op. Atty. Gen. 476 ..... 37, 74, 75, 105, 126

TEXT-BOOKS, ETC., CITED

77 A. L. R. 29 138
77 A. L. R. 42-46, 49 74
77 A. L. R. 83 138
81 A. L. R. 1271 165
6 C. J. 1166, Sec. 173 127
13 C. J. 705-711, Secs. 815-817 164
43 C. J. 1177, Sec. 1948 108
43 C. J. 1181, Sec. 1950 108
43 C. J. 1182, Sec. 1951 108
46 C. J. 599, Sec. 69 117
50 C. J. 74, Sec. 127 72
50 C. J. 80, Sec. 133 74
8 C. J. S. 371, Sec. 56, Note 81 121
8 C. J. S. 372, Sec. 56 127
22 R. C. L., p. 506, Sec. 190 71
1 Chitty's Blackstone (1842 Ed.), 239 102
1 Jones on Evidence (4th Ed.), pp. 88-90, Sec. 52; and pp. 213-214, Sec. 123, Note 18 118
3 Story, Const., Sec. 1120 101
1 Wigmore on Evidence (2d Ed.), Sec. 95 118
Encyclopedia Political Science, Vol. III, p. 310, article on "Post Offices" by Pres. Arthur T. Hadley 103
"Formation of the Union," p. 556 (Government Printing Office, 1927) 101
"History of the British Post Office," by J. C. Hemmeon (Harvard Economic Studies, 1912) 100

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 236.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Petitioner,

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE,

Respondents.

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (May 16, 1938) is reported at 23 Federal Supplement 411-420, and appears in the Record at pages 70-87. The opinion of the Circuit Court of Appeals (April 21, 1939) is reported at 103 Federal Reporter (2d) 450-453, and appears in the Record at pages 101-107.

GROUNDS OF JURISDICTION

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925, Ch. 229, Sec. 1 (43 Stat. 938; 28 *U. S. C. A.*, Sec. 347).

The Circuit Court of Appeals, in affirming the judgment

of the District Court, has erroneously interpreted acts of Congress as denying the petitioner a right to sue on a postmaster's bond for breach of the postmaster's official and statutory duties toward petitioner.

Jurisdiction is sustained by this Court's decision in *Howard vs. United States*, 184 U. S. 676, holding that the Court had jurisdiction to review a decision of a Circuit Court of Appeals, concerning the scope and effect of a federal official's bond and the meaning of a federal statute under which it was given.

Wilkinson vs. Walker (C. C. A. 5), 3 Fed. (2d) 872, 874, was an action on a bond given in bankruptcy. Jurisdiction was upheld "because the laws of the United States authorize the taking of the bond," etc.

In *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, it was decided that for jurisdictional purposes, an action to enjoin a postmaster from misdelivering mail was one arising under the postal laws.

The surety's answer admitted jurisdiction (R. 31).

STATEMENT OF THE CASE

Explanatory Note.

To promote conciseness and clarity in this brief, we refer to Midland Loan Finance Company, the use plaintiff and petitioner, as "plaintiff"; to the defendants-respondents, collectively, as "defendants"; to defendant-respondent National Surety Corporation, as the "surety"; and to defendant-respondent Malone, as the "postmaster." (Although Malone was acting postmaster, all the parties concede that the case is to be disposed of the same as if he had been postmaster.)

Nature of the Case.

This is an action on a postmaster's bond to recover for loss sustained by plaintiff through the postmaster's tortious diversion of numerous business letters, etc., sent through the mails by plaintiff from Minneapolis, Minn., to various addressees at Montgomery, Minn., where defendant Malone was postmaster.

Ultimate Questions Presented.

The postmaster's bond was conditioned, as required by 39 U. S. C., A., Sec. 34, for "faithful discharge of all duties and trusts imposed on him * * * either by law or by the rules and regulations of the Post Office Department."

1. Does the bond benefit private users of the mail who are aggrieved by the postmaster's misdelivery of important business letters in violation of duties imposed upon him by acts of Congress and by regulations of the Department, or is the coverage of the bond limited to such losses as the Government itself may sustain through the postmaster's breach of duty?

2. If the bond does benefit private mail users, has Congress manifested intent that they shall have a right to sue on the bond in the name of the United States for their own use, without first securing consent of an administrative officer of the Government?

No question rises concerning a postmaster's liability for wrongs committed by his subordinates without his participation. The defendant postmaster's personal culpability is established by the verdict and the trial judge's ruling on the surety's motion to dismiss (R. 72-74).

The case does not involve any question as to priorities

between the Government and a private mail-user, if the bond sued on be deemed to benefit both. Nor does it involve any question concerning recovery rights, as between two or more beneficiaries, where two or more claims are made against a single bond for amounts aggregating more than the penal sum of the bond. There is no contention in this case that the Government or any one other than plaintiff asserts any claim against the bond, or that potential claims against it exist. The bond was supplanted by a new one given when defendant Malone was elevated from acting postmaster to postmaster (R. 84). Plaintiff's claim and rights arise under the superseded bond only.

Statement of the Facts.

The trial judge's order dismissing the complaint, after verdict in favor of plaintiff, contains a statement of the essential facts (R. 70-72). The following summary made from that statement will afford a sufficient approach to a consideration of the questions presented:

Plaintiff is engaged in automobile financing in Minneapolis (R. 70). Hunting was an automobile dealer at Montgomery, Minn., and defendant Malone was acting postmaster in that town (R. 71).

Hunting conceived and executed a scheme to defraud plaintiff, by selling to plaintiff ostensible conditional sales contracts and notes securing deferred payments, covering fictitious sales of cars. He forged the contracts and notes, and sold them to plaintiff as genuine paper (R. 71-72).

It was plaintiff's business practice to use the mails in investigating purchasers of cars, whose paper plaintiff was buying or had bought. Letters were mailed to credit references given in connection with the paper bought. Books in

which monthly payments made on the contracts were to be recorded were mailed to the persons required to make the payments, the purchasers of cars. Insurance certificates, receipts, etc., were also mailed to these persons (R. 71).

To guard against plaintiff's discovery of the fraudulent scheme, Hunting induced Postmaster Malone to turn over to him substantially all mail arriving at Montgomery in envelopes inscribed with plaintiff's return card. Hunting disposed of this mail in such manner as to dupe plaintiff for a long time. By making payments from time to time on the fictitious contracts, Hunting facilitated concealment of the fraud (R. 72).

As Judge Nordbye, the trial judge, stated, plaintiff "relied upon the integrity of the United States mails and honestly assumed that the various mail matter addressed in connection with the contracts that it had purchased was being delivered to the persons to whom such mail matter was addressed" (R. 72).

Concerning Malone's relationship to the fraud, the trial judge said:

> "By reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict" (R. 72).

No legal excuse for diverting plaintiff's mail into Hunting's hands has been suggested by either of the defendants or by either of the courts below.

The opinion of the Circuit Court of Appeals recognizes that "the material facts are not in dispute," and sets forth a statement of the facts substantially the same as that made by the trial judge, although omitting some details (R. 102-103; 193 Fed. (2d) 451).

Condition of Bond.

The bond given by Malone was in the sum of $16,000 and conditioned

> "That * * * Malone * * * faithfully discharge all duties and trusts imposed upon him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System" (R. 19).

Bond Statutes Involved.

39 U. S. C. A., Sec. 34: "Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department. * * * The bond of any married woman who may be appointed postmaster shall be binding upon her and her sureties, and she shall be liable for misconduct in office as if she were sole." (The last sentence is here important only as it may throw light on the intended meaning of the phrase in the first sentence, "faithful discharge of all duties," etc.,

and, also, indicate that Congress had in mind the scope of a postmaster's *tort* liability when it fixed the coverage of his bond.)

5 *U. S. C. A.*, Sec. 377: "All bonds taken * * * by the Post Office Department shall be made to and with the United States of America."

39 *U. S. C. A.*, Sec. 815: "* * * Whenever the Postmaster General deems a new bond necessary or expedient, the execution of the new bond may be directed by the Postmaster General."

Statutes Concerning Mail Delivery.

Sections of the federal statutes cited below deal with duties imposed upon postmasters for the benefit of mail-users, to insure delivery of letters to the addressees or return to the senders:

39 *U. S. C. A.*, Sec. 401, providing for advertising letters not delivered.

39 *U. S. C. A.*, Sec. 406: "The Postmaster General may regulate the period during which undelivered letters shall remain in any post office and when they shall be returned to the dead-letter office; and he may make regulations *for their return* from the dead-letter office *to the writers when they cannot be delivered to the parties* addressed. * * *" *Postal Laws and Regulations, 1932*, Sec. 826, requires that all matter reaching the dead-letter office "shall, as far as circumstances permit, be returned to senders, excepting such as is obviously of no value or is unmailable," etc. (Italics supplied.)

39 *U. S. C. A.*, Sec. 407, provides that all domestic letters on which postage has not been fully paid shall be sent to the dead-letter office, but Postal Laws and Regulations,

1932, Sec. 723, provides for giving the sender or addressee opportunity to pay the deficiency in postage before the letters go to the dead-letter office as unclaimed.

39 *U. S. C. A.*, Sec. 408, providing for sending to the dead-letter office domestic letters that cannot be delivered. "If the sender or addressee can not be identified, such letters shall be held for a period of one year awaiting reclamation."

39 *U. S. C. A.*, Sec. 409: "When the writer of any letter on which the postage is prepaid shall endorse on the outside thereof his name and address, such letter shall not be advertised, but, after remaining uncalled for at the office to which it is directed the time the writer may direct or the Postmaster General prescribe, shall be returned to the writer without additional charge for postage, and if not then delivered, shall be treated as a dead letter."

39 *U. S. C. A.*, Sec. 410, requiring letters to be forwarded to an addressee on his request and without additional postage.

18 *U. S. C. A.*, Sec. 315, making it a felony for one to take any letter out of a post office "before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another," or to embezzle a letter.

18 *U. S. C. A.*, Sec. 318: "Whoever, being a postmaster * * * shall unlawfully detain, delay * * * any letter * * * or shall secrete, embezzle, or destroy any such letter, * * * shall be fined not more than $500, or imprisoned not more than five years, or both."

18 *U. S. C. A.*, Sec. 324: "Whoever shall knowingly and willfully obstruct or retard the mail * * * shall be fined not more than $100, or imprisoned not more than six months, or both."

39 *U. S. C. A.*, Sec. 256, providing that not even nonmail-

able letters may be opened by "any person other than an employee of the dead-letter office."

Departmental Regulations Involved.

The following is a summary of various sections of the Postal Laws and Regulations, 1932, the first two of which appear in Title Five, Chapter 1, under the heading: "The Privacy and Safeguarding of the Mails":

Sec. 702, par. 1: "Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail matter." They may furnish proper information to the sender, addressee or post office inspectors, "but shall not withhold such mail from delivery to the addressees" (R. 11).

Sec. 703, par. 1: "Postmasters shall not permit to have access to any mail matter in the post office any persons except duly sworn assistants," etc. (R. 11).

Secs. 722-723: Regulate disposal of letters on which no or insufficient postage has been paid, in conformity to 39 *U. S. C. A.*, Sec. 407, *supra*. Require that addressees and senders be notified.

Sec. 724: Requires return to sender of misdirected letters.

Secs. 729-730: Matter withdrawable from mails only at instance of sender.

Secs. 769-772: Detailed provisions for forwarding mail to addressees.

Sec. 775, par. 1: "Ordinary mail matter addressed to fictitious persons, * * * unless directed to be delivered at a designated place, as a post office box, street and number, or to the care of a certain person * * * shall not be delivered and shall be sent to the Division of Dead Letters * * *

unless the envelope contains the card of the sender or a request to return, in which case such letters or packages shall be returned accordingly" (R. 12).

Sec. 777, par. 1: "Mail matter should be delivered to the person addressed or in accordance with his written order" (R. 12). This section contains numerous and detailed provisions concerning delivery of mail.

Secs. 804-805: Regulate return of letters to a sender whose return card appears on letters, in conformity to 39 *U. S. C. A.*, Sec. 409, *supra*.

The foregoing summary does not purport to cover all postal laws and regulations prescribing measures for the privacy and security of correspondence between sender and addressee. The summary merely attempts to illustrate the central policy of the Government to guard against intermeddling with private mail. All of the provisions embodied in Secs. 701-832, comprising Title Five of the Postal Laws and Regulations, 1932, will be found to be directed to that end.

Government's Attitude Toward Suit.

Defendants have presented an issue as to the right of the plaintiff to sue in the name of the United States without the consent of an administrative department of the Government. Plaintiff takes the position that Congress itself has conferred that right by implication necessarily rising from manifested intent that users of the mail, as well as the Government, should be protected by a postmaster's bond and rising from the absence of any statute forbidding suit in the form in which this action has been brought. The following undisputed facts bear on the attitude taken by the Department of Justice and the Post Office Department toward the case:

July 15, 1936, counsel for plaintiff wrote to the Attorney General a request for authorization to commence the suit (R. 59). The Department of Justice replied, September 22, 1936:

> "This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as stated by you, the claim is the exclusive property of your client. The bond of the Acting Postmaster was executed in accordance with the provisions of R. S. 3834, as amended, U. S. C., Title 39, Section 34. Whether the sureties on a bond executed in accordance with the provisions of this section are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General.
>
> "In the circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it" (R. 58-59).

Later a copy of an order (R. 27-30) overruling demurrers to the complaint was sent to the Solicitor of the Post Office (R. 59).

The Record discloses no attempt or disposition on the part of the Government to obstruct plaintiff in the prosecution of this action, excepting that as shown by the statement of the trial judge, a brief had been filed during the trial, by the United States Attorney for the local district as *amicus curiae*, in support of the surety's position that plaintiff had no right to sue (R. 53-54). A reference to that brief will show that the District Attorney did not question plaintiff's right to sue, if a beneficiary of the bond, but merely questioned that any liability is created by a postmaster's bond in favor of private mail-users.

The Government did not participate in any of the proceedings before the Circuit Court of Appeals.

Proceedings in the Case.

To plaintiff's complaint (R. 3-24), defendants demurred (R. 25-27). Judge Joyce of the District Court overruled the demurrers, holding, on the authority of *United States vs. Howard*, 184 U. S. 676, that the complaint showed plaintiff's right to sue on the bond in the name of the United States for the loss sustained by plaintiff (R. 29).

The surety answered (R. 30-32), denying tortious misdelivery of plaintiff's mail, admitting the court's jurisdiction, pleading that the bond was for the sole benefit of the United States, admitting the existence of duties imposed on the postmaster under the postal laws and regulations, and averring that the action was commenced without the consent or authority of the United States. The postmaster answered, denying breach of duty on his part, and causal connection (R. 32-34). Plaintiff's replies completed the issues (R. 34-35).

As shown by bill of exceptions, trial of the case resulted in a verdict for plaintiff against the defendants for $16,000, October 29, 1937 (R. 63).

November 16, 1937, the surety moved to dismiss the action on grounds principally directed against plaintiff's right as a beneficiary of, and right to sue on, the bond without the Government's consent (R. 63-65, 72-73). Despite an admission of jurisdiction made in the answer (R. 31), the surety also asserted lack of jurisdiction (R. 64). The next day, the postmaster made a similar motion (R. 65-66).

The District Court ordered dismissal of the action as to the surety on two grounds: (1) That the bond covered only

uch losses as might be sustained by the Government itself. 2) That the action was brought without the consent of the nited States (R. 67, 70-87; 23 Fed. Supp. 411). The Court ejected plaintiff's view: (1) That the statute requiring he bond, (39 U. S. C. A., Sec. 34) manifests an intention to enefit users of the mails as well as the Government. (2) hat, by legal intendment, flowing from such intention, mail- sers have a remedial right to sue on such bonds in the name f the United States.

The action was dismissed by the District Court, as to the ostmaster, on the sole ground that, because the surety had een dismissed from the action, diversity of citizenship was estroyed and the Court had no jurisdiction to proceed with he action between the remaining parties, both residents of Minnesota (R. 88).

The District Court's final judgment of dismissal was en- ered June 14, 1938 (R. 88).

August 18, 1938, plaintiff petitioned for leave to appeal o the Circuit Court of Appeals (R. 92-93). August 19, 938, the appeal was allowed (R. 91) and notice of the ap- eal was served August 23, 1938 (R. 90).

In the Circuit Court of Appeals, pursuant to an opinion led April 21, 1939 (R. 101; 103 Fed. (2d) 450), judgment as entered April 24, 1939, affirming the judgment of the District Court (R. 107-108). Petition for re-hearing (R. 09-113) was denied May 10, 1939 (R. 115).

Pursuant to petition, this Court granted a writ of certio- ari to the Circuit Court of Appeals, October 9, 1939 (84 . Ed. 73, 60 S. Ct. 102).

SPECIFICATION OF ASSIGNED ERRORS

Petitioner relies upon and intends to urge as ground for reversal of the judgment of the Circuit Court of Appeals each of the errors assigned in the petition for the writ of certiorari (pp. 16-18) and accordingly here assigns as error that the Circuit Court of Appeals erred in each of the following stated respects:

1. In holding that but a single question was presented to the Court, and that that question was whether a mail-sender could sue on a postmaster's bond, without the consent of the Government, for unauthorized delivery of the mail to one other than the addressee (R. 102; 103 Fed. (2d) 450). Petitioner contends that two questions were presented: (1) Whether mail-users are beneficiaries of a postmaster's bond? (2) If so, whether by legal intendment, the statute requiring the bond permits a mail-user to sue on such bond without any further consent of the Government?

2. In holding that it was not claimed that the defendant postmaster "had any knowledge of the fraud that was being perpetrated by Hunting"—the person to whom the mail was unauthorizedly delivered (R. 103; 103 Fed. (2d) 451). The Record shows that the trial judge merely observed that, although the testimony indicated that the postmaster knew of Hunting's business relations with plaintiff, it did not *directly* establish that Malone was knowingly a party to the fraud (R. 724; the evidence does not negative a finding by the jury on competent *circumstantial* evidence that the postmaster did know of the fraud that was being perpetrated upon plaintiff.

3. In holding that regulations of the Post Office Department may be considered in determining whether or not 39

U. S. C. A., Sec. 34, manifests intention of Congress that mail-users should be protected by a postmaster's bond (R. 106; 103 Fed. (2d) 452).

4. In holding that no inference may be drawn from 39 *U. S. C. A.*, Sec. 34, and related statutes that Congress intended to extend the protection of the bond to private mail-users (R. 106; 103 Fed. (2d) 452).

5. In holding that the decisions of this Court and other authorities cited by plaintiff "fall far short of establishing the proposition that the bond in suit was required for the direct benefit of private mail-users, or that a legal intendment permitting them to sue on the bond should be read into the statute" (R. 106; 103 Fed. (2d) 452).

6. In refusing to hold that, even if the "primary" or "dominant" purpose of 39 *U. S. C. A.*, Sec. 34, in requiring bonds of postmasters be deemed to be the protection of the Government in its fiscal and other relations with the postmasters, plaintiff is nevertheless entitled to recover as a "secondary" beneficiary of the bond, because the Government has no actual or potential claim against the bond (R. 113).

7. In affirming the judgment of the District Court (R. 107-108); such judgment not being supported by the law or the evidence and being contrary thereto.

8. In deciding that plaintiff is not entitled to recover, such decision being contrary to the law and the evidence.

9. In holding that the Court's conclusions were not inconsistent with those decisions in which the Government in actions brought by it upon similar bonds has recovered for theft of letters and the like, irrespective of the Government's liability to the mail-user (R. 106-107; 103 Fed. (2d) 452-453).

SUMMARY OF ARGUMENT

Below we summarize the points hereinafter argued, in the order presented in the argument. The points summarized and the points argued are correspondingly numbered.

I. The Circuit Court of Appeals erroneously confused a question of *substantive* right with a question of *remedial* right, and inaccurately summarized the issues presented.

II. *Howard vs. United States*, 184 U. S. 676, establishes jurisdiction and plaintiff's substantive and remedial rights under the bond—all the principal issues here involved.

III. The Letter of the bond statute confers benefits upon mail-users, as well as upon the Government.

III (a). The surety seeks judicial legislation.

III (b). That the United States was the sole obligee named in the bond is not a controlling factor.

III (c). The statute permits a bond normally sufficient to cover both the Government and mail-users.

III (d). Even if the bond was for the primary benefit of the Government, to secure an accounting, etc., by the postmaster, that does not exclude plaintiff as a secondary beneficiary.

III (e). Departmental regulations do not restrict bond coverage.

IV. The bond coverage is as broad as the postmaster's liability in tort to mail-users.

IV (a). The Record shows that defendant postmaster rendered himself liable in tort to plaintiff.

V. That postmasters are liable for wrongs against mail-users is an old and well-established doctrine.

VI. The degree of the postmaster's culpability is unimportant.

VII. The Spirit, as well as the Letter, of the statute requires that a postmaster's bond be deemed to cover mail-users' losses, as well as losses of the Government.

VII (a). The spirit of the law is found in the consideration that Congress has enacted what it should have enacted for the benefit of mail-users.

VII (b). The spirit of the law is found in the purpose for which the postal service primarily exists—the convenience and needs of the people in their private affairs.

VII (c). A postmaster's principal duties run to users of the mails, not to the Government.

VIII. The decision of the Circuit Court of Appeals conflicts with a settled rule that the Government, as a bailee, can recover on similar bonds for theft of registered letters and the like, irrespective of the Government's liability to the mail-user.

IX. Plaintiff's right to sue in the name of the United States flows from Congressional will or intent that mail-users shall be beneficiaries of the bond, and from omission of Congress to prescribe another and exclusive remedy.

IX (a). Congress has prescribed no special or exclusive remedy, for the benefit of mail-users, on a postmaster's bond.

IX (b). No departmental regulation purports to, or could, prescribe an exclusive remedy on a postmaster's bond.

X. The Attorney General's refusal to approve the bringing of this suit does not defeat the right to sue, because, as he ruled, the Government had no involved interest.

XI. The case falls within the general rule that the beneficiary of a contract has a right to sue to enforce payment of the benefit.

ARGUMENT

I.

The Circuit Court of Appeals Erroneously Confused a Question of Substantive Right with a Question of Remedial Right, and Inaccurately Summarized the Issues Presented.

(See Assignment of Error No. 1.)

In addition to issues litigated at the trial, as to the postmaster having violated his official duties to plaintiff and as to causal connection between such violation and plaintiff's loss—both of which issues have been settled in plaintiff's favor—the surety raised two distinct questions, which originated in its answer: (1) Whether or not the "bond was for the use, benefit, and protection of the United States of America only" (R. 31). (2) Whether or not the action was commenced without requisite consent or authority conferred by the Government (R. 32).

Howard vs. United States, 184 U. S. 676, presents a logical formula for determining the merits of any question as to whether or not a private person has a right to sue on a federal official's bond, conditioned for the faithful performance of the official's duties, where there is no statute that explicitly answers the question. That formula is: First, determine the substantive question, whether or not Congress intended that private persons should be protected by the bond. If Congress did so intend, the right to sue in the name of the United States follows as a matter of necessary implication, and no further consent of the Government is required,

unless there is a statute prescribing a restricted remedy. Had the Circuit Court of Appeals followed this formula it would have stated, in effect, that two questions were presented: (1) Is a private sender of mail through the United States mail a beneficiary of a bond given by a postmaster for the faithful performance of *all* the duties and trusts imposed on him by law or departmental regulations, in view of existing federal statutes and regulations which impose duties on postmasters, concerning the delivery of mail, for the sole benefit of mail-users? (2) If so, is there any statute forbidding the bringing of an action in the form in which this action was brought?

Despite this logical separation of the two questions in accordance with the pattern afforded by the *Howard Case, supra*, defendants and the Circuit Court of Appeals have lost sight of the importance of first determining whether or not plaintiff has any substantive rights under the bond, dissociated from the question of remedy. If that question should be answered in the negative, it is not perceivable how the surety could be held liable, no matter who should bring suit. On the other hand, if the bond should be held to be for the substantive benefit of plaintiff, the second question would merely involve determination as to what remedy or alternative remedies are provided by the Congressional will or intention.

In *United States vs. Globe Indemnity Co.* (C. C. A. 2), 26 Fed. (2d) 191, in an opinion by Judge Learned Hand, the Court followed the pattern of the *Howard Case*, by dissociating substantive and remedial rights. That action involved the right of private persons to share with the Government the protection of a bond taken by the United States in its own name.

We respectfully submit that, in the light of the above-

mentioned considerations, the Circuit Court of Appeals erred in deciding:

> "On this appeal a *single question of law* is presented. It is: May a private sender of mail through the United States mails maintain an action, *without the consent of the government*, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee *without the written consent of the sender?*" (Italics supplied.) (R. 102; 103 Fed. (2d) 450.)

In assuming that this action has been brought "without the consent of the government," the Circuit Court of Appeals ignores the distinct issue as to whether or not Congress has manifested intent that suits on postmaster's bonds may be brought in the form in which this one was brought.

As to the premise that in this case mail was delivered to one other than the addressee, "without the written consent of the sender," that does not adequately represent the basic fact situation respecting the postmaster's culpability. Defendants do not claim that plaintiff consented in any form to the delivery.

The *basic* question is not whether a mail-user can "maintain an action" on a postmaster's bond, but whether the condition of the bond that the postmaster shall faithfully discharge *all* of his duties covers numerous duties to mail-users.

Although, as applied to this case, the question deals only with the wrongful delivery of mail to strangers, to the prejudice of the sender, the ultimate decision in the case will necessarily fix the rights of addressees, as well as senders, of mail. What is more important the decision will determine whether or not a postmaster's bond covers any sort of official misconduct that causes loss to senders or addressees of mail. If the bond does not cover the case at bar, then it could not

cover a case where a postmaster deliberately embezzles or destroys a letter, although that act would be a crime (18 *U. S. C. A.*, Sec. 318). Nor would the bond, under such interpretation, cover a case where a postmaster conspires with a third person to aid the latter in unlawfully securing from the post office letters passing between other persons, for the purpose of obstructing the correspondence or of prying into the secrets of the correspondents—although that would render the third party guilty of a felony (18 *U. S. C. A.*, Sec. 315) and unquestionably would also render the postmaster equally guilty as a conspirator (18 *U. S. C. A.*, Sec. 88, and authorities cited thereunder in note 156).

So, the vital question presented is not whether a postmaster's bond covers any *particular* breach of duty toward mail-users, such as is here involved, but whether the bond covers any breach of duty toward mail-users, where damage flows as a proximate result, regardless of differing degrees of culpability in different cases.

It will be noted that, in the last analysis, the Court does not dispose of the case upon a view that the particular character of a breach of duty by a postmaster determines whether or not a mail-user is a beneficiary of the bond. Despite the reference in the opening paragraph of the opinion to the particular breach of duty committed by the postmaster, the opinion clearly shows that it rests upon a conception that Congress did not intend that any mail-user should be directly benefited by a postmaster's bond, no matter what the degree of the postmaster's culpability may be (R. 106; 103 Fed. (2d) 452).

As to confusion of substantive and remedial rights, we believe that the opinion, as a whole, including the conclusions reached by the Court, shows a confusion of beneficial interest under a bond with capacity to sue to enforce the

interest. In this connection, we specially refer to the last paragraph of the opinion, where it is intimated that plaintiff might have such *indirect* beneficial interest in the bond that the Government could have sued on the bond on plaintiff's behalf (R. 106-107; 103 Fed. (2d) 452-453).

If the bond was not intended by Congress to secure the performance of a postmaster's duties to mail-users, as distinguished from his duties to make fiscal accounting to the Government, etc., how could the surety be held liable in any suit, regardless of by whom brought? But, if Congress intended that mail-users should be benefited by the bond—whether on equal terms with the Government or in subordination to protection of the Government—the opinion of the Circuit Court of Appeals fails to reconcile its decision, that plaintiff has no right to maintain this action, with the decision in *Howard vs. United States*, 184 U. S. 676, that where Congress has manifested intention that private persons be benefited by an official's bond, they have a right to sue for their own benefit, in the name of the United States, unless there is a statute providing another and exclusive remedy.

The foregoing observations are intended merely to serve as an approach to the discussion of specific phases of the case that follows.

II.

Howard vs. United States, 184 U. S. 676, Establishes Jurisdiction and Plaintiff's Substantive and Remedial Rights Under the Bond—All of the Principal Issues Here Involved.

(See Assignments of Error Nos. 1, 5, 6-9.)

Assuming that this Court will find no reason for receding from its decision in *Howard vs. United States*, 184 U. S. 676, we believe that this case, in its last analysis, turns upon a single question: Does a postmaster stand in a relationship

toward private mail-users that is akin to the relationship of clerks of the District Courts towards private suitors? If that question be answered in the affirmative, we respectfully submit that our right to recover is conclusively established by the *Howard Case*.

As will be seen hereinafter, the *Howard Case* involved a statutory bond worded essentially the same as the bond here sued on, running to the same obligee, the United States of America. The Circuit Court of Appeals thus interpreted and summarized this Court's holding in the *Howard Case*:

> "The court found that in view of the fact that the great mass of litigation in the federal courts was between individuals, Congress must have intended that a Clerk's bond should be for the protection of both public and private suitors, and it held that consent to sue in the name of the obligee, the United States, might be assumed to arise by legal intendment" (R. 105-106; 103 Fed. (2d) 452).

From what the Circuit Court of Appeals then proceeded to say, it is clear that the Court recognized that a strong analogy exists between the two cases:

> "We are urged to find a similar legal intendment in the statute under which the bond in suit was taken. In this connection it is said that the letter of the statute confers benefits upon users of the mails as well as upon the government; that the postal regulations relating to the safe conduct of the mail are primarily for their benefit; and that the situation is similar to that in the Howard case in that the principal purpose of the postal system is to transmit private mail. We are of the opinion, however, that *these considerations are outweighed* by the fact that the United States has *sufficient* interest in the integrity of its fiscal and other relations with numerous postal employees over the country to *indicate* that the statute requires a bond *primarily* for the gov-

ernment's protection. It is reasonable to *presume* that Congress intended *primarily* to protect that interest in enacting the statute requiring postmasters to give bond. *The related statutes and postal regulations all point to this conclusion. No inference may be drawn from them that Congress intended to extend the protection of the bond to private mail-users*" (R. 106; 103 Fed. (2d) 452). (Italics supplied.)

Thus, the Circuit Court of Appeals seems to recognize a perfect analogy in the facts of the two cases: (1) In the identity of the obligee, the United States of America. (2) In the *letter* of the bond, and of the statute under which the bond is given. (3) In the administration of an agency principally designed for the benefit of members of the public in their private capacities. (4) In the existence of duties imposed by statute and regulations for the benefit of private persons, as well as for the Government.

But the Court of Appeals holds that "these considerations are outweighed" by the following counter considerations: (1) The Government's interest in its fiscal and other relations with postal employees is such as to *indicate* that a postmaster's bond is required *primarily* for the Government's protection. (2) A *presumption* that Congress intended *primarily* to protect the Government's interest rises from a consideration of the postal statutes and regulations. (3) No presumption may be drawn from the postal laws and regulations that "Congress intended to extend the protection of the bond to private mail-users."

Thus, in effect, the Circuit Court of Appeals virtually concedes that the *letter* of a postmaster's bond would protect private mail-users, if a supposed *spirit* of the statute under which the bond is given did not derogate from the letter.

In passing, we first draw attention to the fact that the Circuit Court of Appeals speaks of the bond as being for the "primary" benefit of the Government. Later on in the opinion, the Court speaks of a "dominant" purpose, but we assume that the Court meant "sole" benefit, in view of the conclusion that Congress did not intend to extend any benefit to private mail-users.

We respectfully submit that a holding that the bond is for the *primary* or *dominant* protection of the Government would not exclude plaintiff from recovering, because even as a *secondary* beneficiary, plaintiff would be entitled to recover. As shown in our statement of the facts, the Government makes no claim on the bond, which has been superseded by a new one, and there is no claimant against the bond, present or potential, other than the plaintiff. So, this Court is not called upon to determine any question of priority that might rise in another suit where a postmaster's bond becomes insufficient to satisfy a private claim or claims and also a claim by the Government. Such questions might be left as completely open for future decision when and if they rise as kindred questions are left open by the Court's decision in the *Howard Case*.

Detailed Resemblances Between the Howard Case and This Case.

Hereinafter, we make detailed references to the opinion in the *Howard Case* to refute positions taken by the defendants, and particularly by the surety. But, so that the Court better may sense the striking factual resemblances between the two cases, we here present the following outline:

Howard Case	Case at Bar
Condition of Clerk's Bond:	*Condition of Postmaster's Bond:*
"* * * *faithfully* to *discharge the duties of his office* and seasonably to record the decrees, judgments and determinations of the court of which he is clerk." (102 Fed. 78, 80, 184 U. S. 681-682.)	"* * * *faithfully discharge all duties and trusts imposed upon him as acting postmaster* either by law or regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government, * * * and shall also perform all duties and obligations imposed upon him * * * in connection with the Postal Savings System" (R. 19).
Obligee	
United States (184 U. S. 682; 102 Fed. 77).	United States of America (R. 19; 5 *U. S. C. A.*, Sec. 377).
Penal Sum of Bond	
$20,000 (184 U. S. 677).	$16,000 (R. 19).
Maximum Penalty Permitted	
$40,000 (184 U. S. 682).	No limit; "in such penalty as the Postmaster General shall deem sufficient" (39 *U. S. C. A.*, Sec. 34).

Who Was Plaintiff?

The United States, at the relation and to the use of David D. Stewart (93 Fed. 720).	United States of America, for the use and benefit of Midland Loan Finance Company, a corporation (R. 3).

Attitude of Government Toward Suit

No showing as to consent or nonconsent to maintenance in name of United States. Act requiring bond held to imply authority in relator to use name of United States (184 U. S. 690-694; 102 Fed. 84-85; 93 Fed. 721).	Attorney General recognized that the use plaintiff should sue in own right; that the Government could take no official action (R. 58-59). This was in response to request to use the name of the United States (R. 58-60). The right to sue is supported by the same implied statutory authority recognized in the *Howard Case*.

Nature of Official Duties Compared

Clerk dealt with both private and public litigants, and was also bound to account to the Government for money or other property in his possession belonging to the Government.	Postmaster dealt with both private and public mail-users, and was also bound to account to the Government for money or other property in his possession belonging to the Government.
Clerk under statutory duties to litigants, private and public, and, also, to Government in fiscal matters, etc.	Postmaster under statutory duties to mail-users, public and private, and, also, to Government in fiscal matters, etc.

To relax the rules laid down in *Howard vs. United States*, 184 U. S. 676, would be to disturb the foundation on which rest many cases that have been decided on the strength of that authority. (See *Rose's Notes and Shepard's United States Citations.*)

State vs. Dahl, 150 Wis. 479, upholding both the substantive and remedial rights of private persons on official bonds, is a notable example of the influence the *Howard Case* has had upon decisions throughout the country.

III.

The LETTER of the Bond Statute Confers Benefits Upon Users of the Mails, as Well as Upon the Government.

(See Assignments of Error Nos. 4-9.)

39 U. S. C. A., Sec. 34, reads:

> "Every postmaster * * * shall give bond * * * in such penalty as the Postmaster General shall deem sufficient, conditioned for the *faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department.*" * * * (Italics supplied.)

In our Statement of the Case, under the heads of "Statutes Concerning Mail Delivery," and "Departmental Regulations Involved" (pp. 7-10), we have abstracted the provisions of numerous statutes and regulations which clearly impose "duties and trusts" on the postmaster, for the benefit of mail-users. There is no escape from the thought that when a postmaster violates any of those duties he *literally* fails faithfully to discharge an official duty or trust imposed by both law and department regulations.

"The liability on the bond being controlled by the

statutory condition for faithful performance of duty, the issues in the suit on the bond are the existence and extent of the duty and whether the duty has been breached."

Title Guaranty & Surety Co. vs. State of Missouri (C. C. A. 8), 105 Fed. (2d) 496, 525.

From *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 402, an action on a county auditor's bond:

"* * * We are not confronted with any limitations written in the condition of the bond, which is simply that the defendant 'shall faithfully discharge the duties of his said office * * *' *under which we are to look only to the statutes of Ohio declaring and defining his duties, in order to determine what they may be.*" (Italics supplied.)

In *Howard vs. United States* (C. C. A. 8), 102 Fed. 77, affirmed, 184 U. S. 676—to which reference has already been made—the Court gave effect to the letter of a federal court clerk's bond. It refused to read into the bond an intendment for the sole benefit of the Government, saying:

"If the statute was made to express the construction contended for, the condition would read, 'faithfully to discharge the duties of his office so far forth as they concern the United States only, * * *.' Obviously, the court cannot ingraft any such limitations on the conditions of the bond."

In *United States vs. Ward* (C. C. A. 8), 257 Fed. 372, 378, the Court followed the *Howard Case, supra,* in holding that the bond of a referee in bankruptcy, conditioned for faithful performance of his duties, covered an illegal exaction and retention of fees by him.

Grady vs. United States (C. C. A. 8), 98 Fed. 238, was a suit on a postmaster's bond for embezzlement of money-order funds. The sureties argued that the bond did not cover the embezzlement, because the statute under which the bond was given also required that the bond be conditioned "for the faithful performance of all duties and obligations in connection with the money-order business." That specific condition was not included in the bond given. The Court held that that condition was embraced within the broad condition that the postmaster discharge "all duties and trusts imposed on him either by law or the rules and regulations of the department." The language of the opinion intimates an interpretation of bonds worded as the one at bar is worded, in line with the thought that an obligation for discharge of *all* of a postmaster's duties fixed by law, rule or regulation, covers *every* duty imposed on him by all of the rules and regulations prescribing what he shall do and what he shall not do.

A public officer's obligation faithfully to discharge his duty is an obligation to discharge all of his duties.

Quimby vs. Adams, 11 Me. 332, 334.

That benefits of a postmaster's bond are to be deemed to include users of the mails, as well as the Government, if the statute under which the bond is given does not *negative* the benefit is a proposition that finds support in *United States vs. Atlantic Coast Line R. Co.* (C. C. A. 4), 215 Fed. 56, 59. The court there said, with its own italicized emphasis:

> "The government could also recover the value of the mail lost for the benefit of the owners of the mail, *provided the contract did not negative the idea of liability extending that far.*"

In *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, the Court dealt with a letter carrier's bond, the conditions of which bore a striking resemblance to the conditions of the bond in the case at bar. The liability on the bond was held to have been enlarged, not only by regulations existing when the bond was given, but by subsequently adopted regulations. And it was held that the Government was entitled to recover for loss sustained by a user of the mails, *even though the Government itself sustained no loss.*

A bond that makes no exceptions when it binds an official to the faithful discharge of all of his duties may enlarge, rather than restrict, the official's liability.

> "There is an established difference between a duty created merely by law and one to which there is added the obligation of an express undertaking."
>
> *Boyden vs. United States*, 13 Wall. 17.

In *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 407, the Court held that a county auditor's bond, for faithful performance of his duties was not only for the benefit of the county and its inhabitants, but, also, protected the whole world against injury from his official misconduct. The Court rejected a contention that the bond was not intended to benefit outsiders, saying:

> "As before remarked, if such a construction were put upon these words, it would show that the legislature of Ohio did not pay that attention to the protection of the public which manifestly they have by such broad and comprehensive language as they used in this official bond, and not adopting those restrictive words which are found in too many of them."

From *United States vs. Bryan* (C. C., N. D., Cal.), 82 Fed. 290, 291; affirmed, *Bryan vs. United States* (C. C. A. 9), 90 Fed. 473:

> "The liability of a public officer upon his official bond is governed, to a large extent, by the terms of the bond itself, and the duties imposed upon him by law. *The terms of the bond sued on in this case are absolute. No exceptions are provided for.* The condition of the obligation was that he should faithfully discharge all the duties and trusts imposed on him, either by law or the rules and regulations of the post-office department, etc." (Italics supplied.)

In a well-considered case *United States vs. Rogde* (D. C., S. D.), 214 Fed. 283 it was decided that a postmaster was not liable on his bond for loss or theft of a registered package *unless the loss or theft could be traced to his personal negligence, wrong-doing or disregard of postal regulations.* But the opinion clearly intimates the soundness of the converse proposition that a postmaster is liable for a mail user's loss that is attributable to his personal wrongdoing.

Excluding any distinction between mishandling of registered and mishandling of unregistered mail, the Court said:

> "This case, therefore, depends upon the answer to the one question of whether or not this defendant Rogde, as postmaster, *under the provisions of his bond, the laws of the United States, and the regulations of the Post Office Department*, became an absolute insurer of all mail matter that came into his hands, whether registered or ordinary mail matter, because it is conceded that there is *no difference in the liability of the postmaster as to the different classes of mail*, unless it be to the amount that the government is liable upon a registered package. * * *". (Italics supplied.)

If, as decided in *Payne vs. Railway Pub. Co.*, 20 App. D. C. 581, 598 (writ dismissed, 192 U. S. 601), the right to transmit mail and have it carried is a "positive legal right,"

and involves a corresponding *duty* of postal officials that is enforceable by mandamus, how can the language of the postmaster's bond statute, providing for security for the discharge of *all* of his *duties* be read as excluding duties to senders and addressees of mail?

That Congress has regarded as being of the highest importance the duties of postmasters in the matter of delivery of the mail is shown by the detailed provisions that are made by 39 *U. S. C. A.*, Secs. 401-411, to secure delivery of letters to the addressees or return to the senders. Had Congress deemed the subject of less importance it probably would have merely required the Postmaster General to make and enforce suitable regulations toward the desired end. But these statutes confer little or no discretion upon the Postmaster General and none upon postmasters.

Sec. 401 provides that the Postmaster General *may* direct that the list of nondelivered letters be published in a newspaper with the largest circulation in the particular post office's delivery area, etc. *Fosters vs. McKibben*, 14 Pa. St. (2 Harris) 168, 170, deals with the responsibility of postmasters under this statute. The Court decided that the postmaster was not answerable to a newspaper publisher for loss of compensation that would have accrued to the latter through the postmaster's publication of the lists, as required by the statute. However, the Court said:

> "But, though a postmaster is not answerable to a publisher *he would be answerable to a correspondent, whose letter had miscarried for want of publication, according to the terms of the statute, because a party actually injured stands on better ground than one who is not*, and for the same reason that such a party may have an action against the author of a public nuisance." (Italics supplied.)

Under *Postal Laws and Regulations, 1932*, Sec. 800, publication of lists of undelivered letters is not now required, but that does not detract from the general purpose of Congress and the Department that appropriate steps shall be taken to insure either delivery of mail to addressees or return to the sender.

Strong vs. Campbell, 11 Barb. (N. Y.) 135, closely resembles the Pennsylvania case last cited. The Court decided that the statute requiring publication of lists of undelivered letters was not for the benefit of publishers, saying:

> "The design of the law obviously was, first, to benefit persons, receiving communications through the post office, by giving the widest possible notice that letters remained on hand ready for delivery; and secondly, to secure the greatest amount of revenue to the department by the delivery of letters and the receipt of postage thereon, which might otherwise never be called for, and consequently be returned to the dead letter office."

The defendant postmaster's delivery to Hunting of mail sent by plaintiff to other persons violated 39 *U. S. C. A.*, Sec. 409, which required that letters not deliverable to the addressees be returned to the sender, whose return card was endorsed on the envelopes. Even if there had been no return card on the envelopes, the delivery to Hunting would have been tortious, because 39 *U. S. C. A.*, Sec. 408, would have required that the letters "be held for * * * one year awaiting *reclamation*."

Hunting committed a felony by obstructing plaintiff's correspondence in violation of 18 *U. S. C. A.*, Sec. 317. Whether or not the postmaster became criminally responsible under this statute, as an aider and abettor, it is clear that he knowingly committed an act which enabled Hunting to com-

mit a crime and which at the same time violated statutory duties owing by the postmaster to plaintiff.

Under Sec. 317, a letter is embezzled by delivery to one other than the addressee unless he is the authorized agent of the addressee.

United States vs. Sander (C. C., N. D., Ohio), 6 McLean 598, Fed. Cas., No. 16,219.

The postmaster's delivery to Hunting of letters not addressed to him was a constructive, if not actual, *detention, delay or secretion* of the letters, within 18 *U. S. C. A.* 318, which makes it a felony for a postmaster to detain, delay or secrete letters.

The postmaster violated the spirit, if not the letter, of 18 *U. S. C. A.*, Sec. 318, which makes it an offense to "knowingly and willfully obstruct or retard the passage of the mail," etc. This statute protects the "transmission of mail from the time the same is deposited in a place designated by law or the rules of the Post Office Department up to the time the same is delivered to those *to whom it is addressed.*"

United States vs. Claypool (D. C., W. D., Mo.), 14 Fed. 127, 129.

Above we have discussed only such duties as are imposed on postmasters by statute, because Congress must be regarded specially to have had in mind the duties it had imposed for the benefit of mail-users, when it required a bond for the faithful discharge of *all* duties. But because the bond also comprehends duties imposed by departmental regulation, the following mentioned regulations (Postal Laws and Regulations, 1932) should not be overlooked:

Sec. 702, par. 1, forbidding postmasters to "give to unauthorized persons information concerning mail matter."

(Giving mail matter itself to unauthorized persons, of course, is the most culpable way that a postmaster could divulge information concerning it.)

Secs. 722, 723, so regulating handling of letters on which insufficient postage is paid as to insure delivery or return to the senders.

Sec. 775, par. 1, requiring that letters addressed to fictitious persons be returned to the sender, if his card appears on the envelope, or to the dead-letter office if there is no such card on the envelope.

Sec. 776, par. 6: A postmaster has no right to deliver a letter even to a post office inspector, without assuring himself as to the inspector's identity by inspecting his commission.

Sec. 777, par. 9: Not even husband or wife can control the delivery of matter addressed to the other.

A postmaster is not permitted to deliver a letter to a minor addressee's guardian over the ward's objection if the ward has reached the age of discretion.

13 *Op. Atty. Gen.* 481.

A postmaster has no right to deliver a letter to one other than the addressee, although commanded to do so by writ of attachment levied at the suit of creditors of the person to whom addressed.

12 *Op. Atty. Gen.* 136.

That a postmaster's bond covers all of his duties in the handling of mail, as well as his duty to account to the Government, was recognized in *Spinney vs. United States*, 32 Ct. Cl. 397, 399. In holding that a postmaster was not entitled to an award for aiding apprehension of an offender against the mails, the Court said:

> "*Postmasters are* not only *under obligation to care for and distribute the mails which come to their hands,* but are also under contract to care for and properly account to the Post Office Department for all public moneys and property which they receive in their official capacity. *For this purpose they are required to give bond,* and every consideration of public policy would seem to suggest that they should not claim rewards for doing those things which lead with greater certainty to the assurance that the *mails* and public money in their possession *are protected from depredation* and robbery." (Italics supplied.)

A technical defense "must not prevent us from seeing the vital elements in the case, which are the obligation of the employee to perform his duty honestly and faithfully, the surety company's bond covering this obligation by language of unmistakable meaning; and, finally, the undoubted breach of the employee's obligation and the condition of the bond." 23 *Op. Atty. Gen.* 476, 484.

In the last cited opinion, the Attorney General, Hon. Philander C. Knox, interpreted the coverage of a postal clerk's bond conditioned essentially the same as the bond at bar, and declared:

> "I am not able to accept the view of the case which * * * remits the sender of the letter to the fruitless right of suing a discredited and bankrupt thief on the chance of bringing hidden assets to light, and which dismisses the surety company, to whose contract the owner is not a party, after the statutory liability of the Government has been settled." (p. 483.)

As hereinafter pointed out, the importance of a postmaster's duties to private mail-users outweighs the importance

of his duties to the Government. But a well-reasoned decision of the Wisconsin Supreme Court shows that a bond for the faithful performance of *all* of an official's duties should be deemed for the benefit of a private class of persons falling within the language of the bond, no matter how small that class may be numerically.

In the Wisconsin case—*State vs. Dahl*, 150 Wis. 479—which followed the *Howard Case*, a state treasurer's bond was conditioned for the faithful discharge of his official duties and for the delivery to his successor or other person entitled of all papers, etc., belonging to the office. The receiver of a savings loan and trust company sued on the bond in the name of the state, on his own relation, to recover for failure to return securities that had been deposited by the company with the state. The Court said:

> "The duty to safely keep the securities in question is a duty whose faithful discharge is guaranteed by the bond just as fully as any other official duty. True it is a duty in which neither the state nor the general public has any direct interest; it is to be performed for the benefit of a class, and probably a very limited class, of people; but *it is none the less an official duty.*" (Italics supplied.)

Official bonds must be interpreted as if the statutory duties of officer were inserted therein and are in effect merely collateral security for performance of officer's duties.

State vs. Alabama Power Co., 230 Ala. 515.

State vs. Nevin, 19 Nev. 162.

There is no inequity in holding the postmaster and his surety to an interpretation of the bond that conforms to the wording of the obligation and of the statute under which it is given.

The postmaster and his sureties are chargeable with notice as to the extent of duties and responsibilities imposed upon him by law or regulation.

Deal vs. United States (C. C. A. 9), 11 Fed. (2d) 3, 7, reversed on other grounds, 274 U. S. 277.

The *Deal Case* was an action on a postmaster's bond for loss of money from a registered package. The evidence tended to show that the package was rifled while in the postmaster's office. It was admitted that he had failed to observe certain regulations intended to secure safety of registered matter, but denied that this disregard of official duty caused the loss. This Court held that the trial judge should have instructed the jury that violation of the regulations would not sustain recovery on the bond unless the violation proximately caused loss. This holding rested upon an interpretation of certain postal regulations as fixing the personal liability of postmasters for post office robberies and depredations upon registered mail.

As we read the decision in the cited case, the verdict for plaintiff on the bond would have been upheld had it been returned under proper instructions and evidence justifying a finding that the postmaster's violation of departmental regulations was the proximate cause of the particular loss. In the case at bar, defendants have taken no steps to review the jury's findings—to which the trial judge refers (R. 72)—"that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict."

"* * * The instrument is required by a statute which defines its terms, and the law of the office is a

part of the contract. The surety guarantees the faithful discharge of all duties properly pertaining to the office, and the extent of such liability can be determined only from the bond and from the statutes creating the office and defining the terms of the bond. See *Lowe vs. City of Guthrie*, 4 Okl. 287, 44 P. 198."

Howard vs. United States (C. C. A. 7), 87 Fed. (2d) 243, 247.

In *United States vs. Barker* (C. C. A. 3), 100 Fed. 34, a postmaster was held liable on his bond for violating a regulation forbidding postmasters to afford access by unauthorized persons to blank money orders. His assistant, for whose act he was found to be liable, delivered such blanks to an impostor who posed as a post office inspector. The blanks were used in forging money orders which were paid by post offices in other towns. The Court said:

"This regulation prescribes one of the duties of a postmaster for the performance of which he gives bond. The duty thereby imposed is an absolute one, and its breach undoubtedly would constitute a forfeiture of the obligation of the bond."

As to culpability, the case at bar is much stronger than the cited case, because there the money order blanks were innocently delivered to a person believed by the postmaster to have a right to receive them, whereas, here the postmaster knew that plaintiff's mail was being delivered to a person not entitled to receive it.

The regulation involved in the last cited case, in addition to prescribing a duty, specified that the postmaster would be held responsible for any loss suffered by the Department through disregard of the regulation. But the opinion shows, as above quoted, that the Court rested its decision, not upon

that provision, but upon the part of the regulation that prescribed the postmaster's *duty*.

In a Canadian case, a postmaster gave bond to secure against his misfeasance. He opened a letter, abstracted checks therefrom, forged the payee's endorsements, and guaranteed the checks. A losing bank sued on the bond, but the Court held the bond did not cover the loss. The loss was not proximately caused by larceny of the checks but by the forgery of the endorsements and the making of the guaranty. The Court further noted that the letter and its contents did not belong to the bank.

Postmaster vs. McColl, 31 U. C. C. P. R. 364.

The implications of the last cited case are that the sender or addressee of the letter could have recovered on the bond.

From *Thunder Hawk School Dist. No. 8 vs. Western Surety Co.*, 58 S. D. 312:

> "The official bond of the township treasurer is required to be conditioned 'for the faithful performance of his duties as such treasurer.' *Language more inclusive could hardly be used.*" (Italics supplied.)

The language of the bond at bar is even more explicit, for it requires a bond for faithful discharge of "all" of the postmaster's duties.

An unconditional bond for performance of official duties, such as the one at bar, should be regarded as being mainly directed to the providing of *security* for the performance of those duties. Obviously, the principal purpose is to guard against the official's insolvency and the consequent inability of those whom he has aggrieved to enforce their claims against his property.

An official bond *insures* the performance of official duty.

Berau's vs. United States, 13 Wall. 56.

We concede that Congress *could* enact a statute that would limit coverage of a postmaster's bond to losses of the Government, and thereby leave mail-users remediless, excepting as the postmaster may be solvent. But we assert that Congress should not be deemed to have adopted a policy that exposes mail-users to a risk of losses at the hands of postmasters that the Government is unwilling to take itself, unless that policy be explicitly declared. The declaration certainly does not exist in statutory wording that favors mail-users as much as it does the Government. In passing, it is to be noted that it costs the Government no more to protect both itself and mail-users than to protect itself alone, because the Government pays no part of the premiums on such bonds. (6 *U. S. C. A.*, Sec. 14.)

While it is true that a clearly worded bond statute may limit coverage to less than all of the official's duties, it is not to be overlooked that the statute and bond may be so worded as to enlarge liability existing apart from it.

In *Boyden vs. United States*, 13 Wall. 17, this Court noted that a receiver of public monies, as bailee, probably would not be liable for loss not caused by his fault. But the Court added:

> "He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which there is added the obligation of an express undertaking."

The last cited case was followed in *Smythe vs. United States*, 188 U. S. 156, 167.

See, also, *United States vs. Fordyce* (D. C., W. D., Ky.), 122 Fed. 962, where a postmaster's bond was held to cover

losses of stamps and money order funds, although he was not personally at fault.

To the same effect, see *United States vs. Bryan* (C. C., N. D., Cal.), 82 Fed. 290, affirmed (C. C. A. 9), 90 Fed. 473.

If a postmaster's bond be deemed to cover losses for which he is not personally at fault, because the letter of the bond covers the losses, there are stronger reasons for imposing liability on the bond where, as here, the loss is not only within the letter of the bond but was, also, caused by the postmaster's own deliberate fault.

III (a).

The Surety Seeks Judicial Legislation.

To give effect to the surety's contentions must involve an *amendment* of the statute, and not an interpretation. The surety would change the statute by adding to it the wording italicized below, or its equivalent:

> "Every postmaster * * * shall give bond * * * for the faithful discharge of all duties and trusts imposed on him, * * * *for the benefit of the Government.*"

The alternative would be to add to Sec. 34:

> "Provided, that the bond herein provided for shall be deemed to be for the sole benefit of the Government."

From *Sweet vs. United States* (C. C. A. 8), 228 Fed. 421, 423:

> "The United States now asks the courts to amend section 6 by adding thereto the words 'nor shall,'" etc. "But such an amendment * * * would be violative of settled canons of construction and established principles of law. * * * *The conclusive legal presump-*

tion is that the legislative body meant what it said, and the duty of the courts is to give effect to its acts, not to amend or repeal them." (Italics supplied.)

The postmaster's bond statute falls squarely within the rule that the letter of an unambiguous law is not to be disregarded on the pretext of pursuing its spirit.

Crooks vs. Harrelson, 282 U. S. 55.

From *Palmer vs. Massachusetts*, 83 L. Ed. 8, 10, decided at this term:

> "And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendos of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism," etc.

We respectfully suggest that wariness is specially enjoined when, as here, an attempt is made, not only to impute to Congress an intention to restrict where the legislative phraseology permits no restriction, but also to impute to Congress an intention that the people themselves, in their individual capacities, shall be left remediless, in dealing with a governmental agency created principally for their private benefit, despite an act of Congress which, on its face, makes them co-beneficiaries with the Government in security for the performance of official duty.

There is no hardship in holding a surety to obligations falling within the plain and ordinary meaning of the words

in which its bond is couched, and of the statute pursuant to which the bond is given. But even if a hardship did result, the case would still fall within what this Court said in *Jos. Schlitz Brewing Co. vs. United States*, 181 U. S. 584, 589:

> "Yet this apparent hardship will not authorize us to do violence to the clear language of the statute. If the law afford him an imperfect relief, his remedy is by application to Congress for additional legislation, and not to the judicial power for a strained interpretation of the law already in force."

From *St. Louis, I. M. & S. R. Co. vs. Taylor*, 210 U. S. 281, 295:

> "There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. * * * It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body."

To the same effect are:

American Bank Protection Co. vs. City National Bank (D. C., E. D., Tenn.), 203 Fed. 715, 719.

Ladew vs. Tennessee Copper Co. (D. C., S. D., Tenn.), 179 Fed. 245, 252.

We adopt the language used by the surety at page 15 of its reply to the petition for certiorari, merely adding the word "not," to show the nature of recourse open to sureties if they deem themselves aggrieved by the postmaster's bond statute: "Of course, if there be any good reason why users of the

mail should" *not* "be permitted to sue on postmaster's bonds, those reasons should be addressed to * * * the Congress."

We reject the surety's suggestion that reasons for changing the law on this point might be addressed to the Postmaster General, as an alternative to addressing Congress, and the surety's intimation that the Postmaster General might "fix the conditions of future bonds to permit such suits." Here, again, the surety discloses its fundamental misconception that the Postmaster General can add to or subtract from rights fixed by Congress.

In *Payne vs. Railway Pub. Co.*, 20 App. D. C. 581, it was said, concerning classification of mail-matter:

> "There would seem to be some inequality with which Congress should deal; yet it is not the province of the Postmaster General to remedy the evil, if evil there is, by a postal regulation, or by unwarranted interpretation of the law."

We borrow from *Meads vs. United States* (C. C. A. 6), 84 Fed. 684, 694, an action on a federal official's bond, the pertinent observation:

> "There is therefore no equitable feature in the position of the sureties by reason of which they should be favored by any nice or doubtful interpretation."

The suggestion made by the surety in this connection, that a postmaster is entitled to look "only to his departmental superiors" is answered by what was said in *Commerford vs. Thompson* (C. C., Ky.), 1 Fed. 417, 419:

> "The mails are, *prima facie*, intended for the service of every person desiring to use them; and a monopoly of this species of commerce is secured to the post office department. * * * It is, then, scarcely necessary to

> say that *the officers of the department are the agents of the public in the performance of this service*, and that no postmaster, whether acting under the instructions of the postmaster general or not, can lawfully refuse to deliver letters addressed to his office, unless special authority for so doing is found in some act of Congress. Indeed, the unlawful detention of letters by a postmaster is denounced by sections 3890 and 3891, and a violation of his duty to deliver mail is made punishable by fine and imprisonment." (Italics supplied.)

At page 15 of the surety's reply to our petition for certiorari it is contended that an interpretation of the statutes and bond here involved, as permitting mail-users to sue on postmaster's bonds, will produce a situation not "dreamed" of by the Post Office Department, or the Attorney General, or by the postmaster, or by the surety.

Although the surety here refers to the right of a mail-user to *sue*, the context indicates that, confusing substantive and remedial rights, the surety's argument at this point is directed against the substantive rights of mail-users as beneficiaries of postmasters' bonds.

As to the postmaster and the surety, they had no right to "dream" that their bond for the faithful discharge of *all* of the postmaster's duties included only a *part* of his duties. Both were bound to interpret their obligation in the light of the fact that the postmaster's principal duties were owing to mail-users, and not to the Post Office Department, excepting as the Department operates as an agency for mail-users.

As to remedies for breach of the bond, it is unimportant what may have been in the minds of the postmaster and the surety. They were bound to assume that some appropriate remedy would exist in favor of a mail user if he should be aggrieved by the postmaster's breach of official duty. They

ought to have contemplated that the injured party could sue, unless there was a statute to the contrary.

Howard vs. United States, 184 U. S. 676.

As to the Attorney General, he does not rule that mail-users are or are not beneficiaries of a postmaster's bond. He says:

> "Whether the sureties on a bond * * * are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General" (R. 59).

III (b).

That the United States Was the Sole Obligee Named in the Bond Is Not a Controlling Factor.

If the surety should pursue in this Court a contention made in the lower courts, it will rely on the fact that the obligee named in the bond here involved is the United States. But that contention is fully answered in *Howard vs. United States* (C. C. A. 8), 102 Fed. 77, 80:

> "The United States is named as the obligee in the clerk's bond, as is done in the case of the marshal's bond *and the bonds of other officers of the United States;* but the bond is given for the indemnity of any one (the United States no more than any private suitor) who suffers loss by the breach of the condition of his bond 'faithfully to discharge the duties of his office.' This comprehensive condition embraces every duty and obligation imposed on him by law or the lawful order, usage, and practice of the court. *Grady vs. U. S.*, 39 C. C. A. 42, 98 Fed. 238." (Italics supplied.)

This Court, in upholding the Circuit Court of Appeals, overruled a contention "that, the bond in suit having been

given to the United States, it must be deemed an instrument for the sole benefit of the government," etc.

Howard vs. United States, 184 U. S. 676, 687.

The decision in the *Howard Case*, that a private beneficiary of a bond running to the United States could sue on it in the name of the United States could not have completely escaped attention in governmental circles. The fact that the decision has stood for nearly forty years without any substantial change in various acts of Congress dealing with official bonds creates a strong inference that both Congress and the administrative agencies of the Government have acquiesced in the rule so laid down by this Court.

In *State vs. Dahl*, 150 Wis. 479, which followed the *Howard Case*, the Court ruled that a state treasurer's bond was none the less for the benefit of private persons aggrieved by his breach of official duty because the State was named as obligee.

United States vs. Globe Indemnity Co. (C. C. A. 2), 26 Fed. (2d) 191, also followed the *Howard Case*. It was held that a bond to perform a contract for cartage of imported goods to appraisers' stores, was for the benefit of owners of the goods as well as of the Government, although it ran to the United States, and that the surety could not complain so long as it got a good discharge.

United States, to Use of Kinney, vs. Bell (C. C. A. 3), 135 Fed. 336, was an action on a Federal Circuit Court clerk's bond, conditioned for the faithful performance of the duties of his office. The Court said:

> "Although the bond of a clerk of the United States Circuit Court (as in this instance) is given to the United States as sole obligee, yet, no doubt, such bond is available to any private suitor to indemnify him for

> any loss he has sustained by reason of the failure of the clerk to discharge any of the duties of his office."

In the cited case the bond was alleged to have been broken through the clerk's refusal to issue summons in another action. Recovery was denied on the ground that the Court did not have jurisdiction of the other action in which it was sought to have summons issue.

See, also, *In re Walker Grain Co.* (C. C. A. 5), 3 Fed. (2d) 872, 874, where the Court said of a bond given in bankruptcy: "Although the bond is made payable to the United States, it is so made for the benefit of petitioning creditors."

In *State vs. Norwood*, 12 Md. 177, a private person sued on a court clerk's bond running to the State. The defendants objected that the equitable plaintiff could not maintain the action unless he could show that the State had authorized him to do so. The Court said:

> "The laws which provide for the execution of bonds similar to the one before us do not require them for the purpose of protecting the rights of the state alone. They are also designed to secure the faithful performance of official duties, in the discharge of which individuals and corporations have a deep interest, and therefore they should have the privilege of suing such bonds for injuries sustained by them through the negligence or malconduct of the officers. Such doctrine in regard to public official bonds we consider as having been long established in Maryland, whatever may be the law elsewhere. And, entertaining these views, we cannot agree with the defendants' counsel in supposing the present equitable plaintiffs could not institute this suit; because they had not obtained authority from the state for that purpose" (p. 194).

The cited case is referred to, approvingly, in *Howard vs. United States*, 184 U. S. 676, 692-693.

In turn, the doctrine of the *Howard Case*, with the reference to the Maryland decision, was adopted in *City of Beckley vs. Moran* (C. C. A. 4), 61 Fed. (2d) 238, 241. In the latter case the bond of a chief of police was held to cover liability to one wrongfully arrested by him. The bond named the city as obligee and was conditioned that the officer "faithfully and impartially discharge the duties of his office, * * * and shall account for and pay over all money which may come into his hands by virtue of said appointment." It will be observed that the bond was of the same pattern as the one at bar (R. 19) in the respect that each bond first covered the officer's duties generally and then specifically covered fiscal duties.

The mere fact that mail-users are very numerous makes it natural that Congress should have designated the United States of America as the obligee of postmasters' bonds, without any intention either to restrict the beneficial coverage of the bond or to bar a remedy enforceable directly by private beneficiaries.

In *State vs. Gaver*, 115 Md. 250, the Court dealt with cases where bonds run to a State, in which the State has no interest—such as bonds on appeal and in guardianship and insolvency proceedings affecting private interests only. Referring to some earlier Maryland decisions, the Court said:

> "These cases hold that where a bond is required by law, and the statute does not specify to whom it shall be made payable, it may, *where many persons are interested*, be taken in the name of the state, and that suit may be brought on it by those for whose protection it is required, *without* obtaining the authority of the state for that purpose." (Italics supplied.)

District of Columbia vs. Fidelity & Deposit Co. (App. D. C.), 271 Fed. 383, was referred to by the Circuit Court of

Appeals in the case at bar as supporting a general rule that only the obligee of a bond can sue on it (R. 105; 103 Fed. (2d) 452). The action was brought to the use of a private person on a bond running to the District of Columbia. That the attention of the District Court of Appeals was not drawn to the *Howard Case* is to be inferred from the fact that the Court quotes from *Corporation of Washington vs. Young*, 10 Wheat. 406, 409, and then adds: "So far as we know, this has remained the view of that Court as to sealed instruments." Since the *Young Case* was discussed at length in the *Howard Case* and there distinguished (184 U. S. 690-692) it is inconceivable that the District Court of Appeals would have omitted a reference to the *Howard Case* had it known of the case, and it is not probable that the Court would have disregarded this Court's precise pronouncement that a private person may sue on a bond intended for his protection even though the United States of America is the only obligee named in the bond.

The District Court of Appeals said that "Congress has proceeded upon the same assumption"—as to the obligee being the only person who could sue. We doubt that the Court would have so declared had it known of the *Howard Case*, and noted that Congress constructively acquiesced in the holding in that case that a Federal Court clerk's bond may be sued on by a private person in the name of the United States, although the United States is the sole obligee. The statute under which Federal Court clerks' bonds are required (28 *U. S. C. A.*, Sec. 513) remains unchanged long after the *Howard Case* was decided.

In *Burkland vs. Bliss*, 62 S. D. 91, plaintiff sued on city police officers' bonds for false imprisonment. The bonds were conditioned for the faithful performance of official duty and "were made payable to the city." There was no statute

expressly conferring benefits of such bonds on third persons. The Court reviewed authorities holding sheriffs liable on similar bonds, and concluded:

> "The right of an individual to maintain an action on the bond of a peace officer given to a city is not distinguishable in principle from an action upon a bond of a sheriff wherein the county is named as obligee."

From *Hollister vs. Hubbard*, 11 S. D. 461:

> "While the statute requires that the sheriff's official bond shall be in form given to the county, as a matter of expediency, it is designed to protect the public, whose servant he is, and indemnify each person that may be injured by his default or misconduct in office. By becoming the nominal obligee, pursuant to statute, the county assumes no liability for costs, or other responsibility in connection with a suit of this character, and *no reason exists for requiring it to be made a party.*" (Italics supplied.)

This is in line with what the Attorney General wrote counsel for plaintiff in the case at bar, that plaintiff's claim was its own exclusive property and that the case was not within the Attorney General's control (R. 58-59).

From *Scott vs. Feilschmidt*, 191 Iowa 347:

> "One suffering damage at the hands of one required to give bond by reason of the breach of the bond may bring action on the bond regardless of who is named as obligee therein."

To the same effect, see:

City of Cairo vs. Sheehan, 173 Ill. App. 464.
People vs. Morgan, 188 Ill. App. 250.
Town of Lester vs. Trail, 85 W. Va. 386.
State vs. United States F. & G. Co., 85 W. Va. 720.

In the last cited case, the Court cites several decisions of the West Virginia Supreme Court of Appeals, all to the effect that a bond securing faithful performance of official duties is for private, as well as public benefit, although the obligee is the State or a municipality.

III (c).

The Statute Permits a Bond Normally Sufficient to Cover Both the Government and Mail-Users.

(See Assignments of Error Nos. 4-6.)

There is no limit on the penalty that may be fixed in a postmaster's bond. He must give bond "in such penalty as the Postmaster shall deem sufficient." (*39 U. S. C. A.*, Sec. 34.)

Defendant postmaster could have been required to give bond in the sum of $50,000, or even more, although a bond in a considerably smaller sum probably would be normally adequate reasonably to secure faithful discharge of his official duties to all interested in their performance.

Occasionally, as in the case at bar, the Post Office Department will take a bond that is insufficient to secure against loss caused by the postmaster's breach of duty. But that eventuality cannot diminish the effect of a statute that requires a bond for the performance of all duties.

The Government is always in a position to exact a new bond from a postmaster if a recovery on an existing bond diminishes security for the further performance of his duties. *Postal Laws and Regulations, 1932*, Sec. 414, provides: "Postmasters shall furnish new bonds whenever deemed necessary by the First Assistant Postmaster General."

Judge Nordbye, the trial judge, argues that, in this case,

the entire bond will be exhausted by plaintiff's claim and that "such a situation cannot be reconciled with the primary purpose of the statute, which is to provide means whereby the losses of the Government will be *first* indemnified" (R. 81). (Italics supplied.).

We respectfully submit that that argument finds a complete answer in *Howard vs. United States*, 184 U. S. 676. There a statute, which originally required a Federal Court clerk to give a bond in the flat sum of $2,000, conditioned for faithful discharge of his duties, etc., was so amended as merely to raise the penalty sum to a minimum of $5,000 and a maximum of $20,000, as determined by the Attorney General, with conditional authority given him to require a bond not exceeding $40,000. (See 102 Fed. 80 and 184 U. S. 681-682.) These changes in the statutes requiring a clerk's bond were not accompanied by any change in the *condition* of the bond; from the original enactment in 1789 on down through the years the condition remained the same—"faithfully to discharge the duties of his office," etc.

It necessarily follows from the decision in the *Howard Case* that the penal amount of a particular bond has no relation to its legal coverage, and does not determine the parties entitled to its benefits. This Court attached no importance to the adequacy of the bond potentially to protect all parties, including the Government and private parties, suffering losses. The decisive factor was the condition of the bond, read in the light of the clerk's relationship to private parties.

In the *Howard Case*, the bond of a clerk for so important a judicial district as one including Kansas City and surrounding territory was fixed at only $20,000, as against a $16,000 bond in the case at bar for a postmaster in so small a town as Montgomery, Minn. (1,570 population according

to 1930 census.) It so happened, in the *Howard Case*, that the clerk's misconduct involved only $2,525. But the decision clearly would have been the same if the amount had been $20,000, the full penalty of the bond.

The only reference made in the *Howard Case* to the amount of a bond being indicative of legislative intent as to who should be protected is the statement of this Court to the effect that authority in the Attorney General to require a bond not in excess of $40,000 implied intent to protect both public and private parties. (184 U. S. 687.).

If, as held in the *Howard Case*, power given the Attorney General to increase to, but not beyond $40,000 the penalty to be fixed in a clerk's bond, is indicative that the bond was intended to benefit both public and private parties, then for much stronger reasons does not the giving of unrestrained power to the Postmaster General in the matter of fixing the penalty in a bond bearing similar conditions indicate like intent?

Because plaintiff is the only claimant against the bond, any question as to whether plaintiff could have exhausted the bond to the prejudice of the Government, if the Government had had a claim on the bond, is a moot question. A final decision in this case can be safeguarded against its being treated as a precedent on that point.

A decision as to the liability of defendant Surety Company to plaintiff, a user of the mail, does not require any weighing of benefits of the bond as between the Government and users of the mail. The Government asserts no claim on the bond, and can have no future claim under it, because a new bond has been substituted (R. 84). How rights of the Government and plaintiff properly would have been reconciled or determined had the Government sustained a loss under

the bond and had the combined losses of the Government and plaintiff exceeded the penalty of the bond, is a question not here presented.

The essential question is whether the bond operates to the benefit of users of the mail, as well as the Government. That is the only question in which the surety has any legitimate interest. It has no standing to represent the Government's interests. Its solicitude for the financial welfare of the Government in a class of cases not here involved—where a bond may be insufficient to cover losses of both Government and post office patrons—is a mere avenue through which the surety seeks to escape from liability on the ground that the only party who claims injury through failure of the postmaster faithfully to discharge the duties of his office was not a beneficiary of the surety's guaranty.

The surety is not concerned with priority rights as between two or more beneficiaries of the bond, or whether one beneficiary exhausts the bond to the exclusion of a potential beneficiary. The surety is protected by the consideration that it is liable only for breaches of the bond, and not liable for more than the penalty of the bond.

> "Certainly, in the absence of a statute providing therefor, the surety cannot be made a trustee and the burden be imposed upon him of ascertaining who are all of the present or possible future claimants to share in the amount covered by the bond. However much the idea of prorating liability among the different claims might at first thought appeal to a court of equity, it can have no place in this action because the measure of liability of the sureties is the statute and the terms of the bonds, and the holder of a second judgment can have no equity against a surety who has paid in good faith an earlier judgment which exhausts the full penalty of the bond."
>
> *Southern Surety Co. vs. Bender*, 41 Ohio App. 541.

The solicitude of the surety for the Government's interest in a type of case not here presented—a supposed case where a bond is not sufficient to cover losses of the Government and losses of private parties—finds a close parallel in *United States vs. Abeel* (C. C. A. 5), 174 Fed. 12, 20, a suit on a Federal Court clerk's bond for the benefit of numerous private parties. In response to a claim that the Government could not recover because it did not name the persons for whose benefit the action was brought, the Court said:

> "To hold that this suit cannot proceed without naming them would be equivalent to saying that the clerk could appropriate the fund and hold it because of the fact that it is not possible, under the circumstances to name them all. *We would not willingly reach a conclusion leading to results so injurious to the public interests.*" (Italics supplied.)

III (d).

Even if the Bond Was for the PRIMARY Benefit of the Government, to Secure an Accounting, etc., by the Postmaster, That Does Not Exclude Plaintiff as a Secondary Beneficiary.

(See Assignment of Error No. 6.)

The Circuit Court of Appeals says that no inference may be drawn from related statutes and regulations "that Congress intended to extend the protection of the bond to private mail-users." But that Court somewhat diminishes the force of that holding by declaring that "it is reasonable to suppose that Congress intended *primarily* to protect" the interest of the Government, and by concluding that "the *dominant* purpose of Congress was to provide protection to the United States" (R. 106; 103 Fed. (2d) 452). (Italics supplied.)

In our petition for rehearing in the Circuit Court of Appeals, we drew attention to the point that a holding that a postmaster's bond is for the "primary" or "dominant" benefit of the Government does not necessarily exclude a secondary or subordinated benefit in favor of private mail-users, and that because the Government makes no claim on this bond, the bond should be enforceable for plaintiff's benefit, even if plaintiff be only a secondary beneficiary of the bond (R. 113).

As noted in the preceding subdivision of this brief, Judge Nordbye, the trial judge, spoke of "the *primary* purpose of the statute, which is to provide means whereby the losses of the Government will be *first* indemnified" (R. 81; 23 Fed. Supp. 417). (Italics supplied.) Judge Nordbye seems to recognize the existence of a secondary benefit in favor of mail-users, but holds that it is a benefit that must be enforced in a suit brought by the Government. He says, at the pages last cited:

> "However, the moral obligation of the Government to protect the patrons of the post office who may have suffered loss, whenever it may proceed against an available fund, is entirely consistent with the apparent purpose of the statutes in question. It is the Government that must institute the proceedings. *If a surplus remains after the Government has been made whole, the public has the right to expect an equitable distribution of the balance. The present suit*, being instituted by a private person without the consent of the Government, *would exhaust the entire bond*, and such a situation cannot be reconciled with the *primary* purpose of the statute, which is to provide means whereby the losses of the Government will be *first* indemnified. Certainly, such circumstances have a bearing upon the ultimate interpretation which should be made with reference to the intent of Congress" (R. 81). (Italics supplied.)

(In passing, we respectfully assert that "the *moral* obligation of the Government to protect the patrons of the post office" can be best discharged by taking a bond that makes the postal patrons *legal* beneficiaries thereunder. In fact, if the bond does not cover the patrons' losses, there is nothing that the Government can recover on their behalf. So, with all due respect to Judge Nordbye's opinion, we submit that "the moral obligation of the Government to protect the patrons of the post office" is the spirit of the bond and of the statute under which the bond was given, and that that spirit accords with the letter of the bond and the statute.)

Once it be determined that the bond involved in the case at bar was for the joint benefit of the Government and users of the mail, even though for the *primary* benefit of the Government, the plaintiff's showing that it is the only claimant against the bond, and that the Government has no claim against the bond, establishes plaintiff's right to recover, without regard to what difficulties may arise in other and future cases where there are more claims than can be discharged by another bond.

A contract need not be *exclusively* for the benefit of a third party in order to give him a right thereon.

Hartman Ranch Co. vs. Associated Oil Co., 10 Cal. (2d) 232.

In *Ohio Casualty Ins. Co. vs. Beckwith* (C. C. A. 5), 74 Fed. (2d) 75, 78, the Court said, in holding that a third party was entitled to sue on a liability policy:

> "Where a contract creates a right or imposes a duty in favor of a third person, the law presumes that the parties intended to confer a benefit on him and furnish him a remedy. 81 A. L. R. 1287; *Durasher vs. Rau*, 135 N. Y. 219, 32 N. E. 49. *And this is so, although the*

primary purpose of the parties to the contract was to benefit themselves. Byram Lumber Co. vs. Page, 109 Conn. 256, 146 A. 293. In such a case the third party need not be known or know of the contract at the time it is entered into; it is sufficient that he can be identified and is able to establish the fact that he is a beneficiary. *Whitehead vs. Burgess*, 61 N. J. Law 75, 28 A. 802." (Italics supplied.)

III (e).

Departmental Regulations Do Not Restrict Bond Coverage.

(See Assignment of Error No. 3.)

We respectfully submit that the Circuit Court of Appeals erred in holding that regulations of the Post Office Department may be considered in determining whether or not 39 *U. S. C.* A., Sec. 34, manifests intention of Congress that mail-users should be protected by a postmaster's bond (R. 106; 103 Fed. (2d) 452). The Circuit Court of Appeals says:

> "It is reasonable to presume that Congress intended primarily to protect that interest"—the Government's interest in the integrity of its postal employees—"in enacting the statute requiring postmasters to give bond. The related statutes *and postal regulations* all point to this conclusion. No inference can be drawn from them that Congress intended to extend the protection of the bond to private mail-users." (Italics supplied.)

The Circuit Court of Appeals does not specify the regulations that are conceived to negative an intention of Congress that private mail-users be protected. The opinion refers to but two regulations: Postal Laws and Regulations, 1932, Secs. 777 and 816. Sec. 816 merely provides departmental procedure for recovery from postal employees for certain

losses due to wrongful delivery of mail, and that amounts recovered "shall be paid to the United States *and to the senders or owners of the mail as their interests shall appear.*" (Italics supplied.)

So, Sec. 816 recognizes, rather than negatives, a *beneficial interest* in "senders or owners of mail" on bonds of the general character here involved.

Because Sec. 816 deals with remedies rather than substantive rights we defer a discussion of the effect of this regulation to the later part of this brief, dealing with plaintiff's remedial rights. But the part of the section which we have above italicized does recognize the *liability* of postal employees for losses caused to senders or owners of mail, whatsoever may be the remedy to enforce that liability.

As to Sec. 777, it provides, first, that mail *should* be delivered to the addressee or on his written order. It then provides that if a third person requests delivery of mail, "*claiming that the addressee has verbally given him authority to receive it*, the postmaster, if he doubts the authority, may require it to be in writing," etc. The postmaster in this case cannot excuse his wrong as having involved the exercise of discretion under this regulation, even if the regulation be regarded as consistent with the statutes governing delivery of mail. (1) There is no showing that Hunting claimed that he had verbal authority from any of the addressees to receive mail addressed to them. (2) The section obviously does not contemplate any discretion in a postmaster to deliver to a single person mail addressed to more than a hundred different persons. (See Exhibit B, R. 21-23, which lists more than 80 different persons as purported purchasers of cars from Hunting, under pretended conditional sales contracts fraudulently sold by him to plaintiff.) Plaintiff's mail was addressed not only to the purported

purchasers, but also to credit references purported to have been given by the purchasers (R. 71-72).

Sec. 777 should not be read as providing a postmaster with a shield against liability for mass diversion of mail. In the face of the strict measures which Congress itself has set up to safeguard against unauthorized delivery of mail, the most that should be said of Sec. 777 is that it gives slight discretion to a postmaster in delivering mail addressed to a single addressee—as where one member of a family requests delivery to him of mail addressed to another, under circumstances that raise no suspicion that the recipient intends to divert the mail from the addressee. If the section be read as having purported to give the postmaster in this case discretion to deliver to Hunting all of the hundreds of letters that plaintiff sent to more than one hundred persons at Montgomery, in face of the postmaster's knowledge of Hunting's business relations with plaintiff (R. 72), then we assert that, to that extent at least, the regulation is a nullity as being in conflict with the policy expressed by Congress in the mail statutes to which we have referred in our Statement of the Case and in Subdivision III of this argument.

In *Campbell vs. Galeno Chemical Co.*, 281 U. S. 599, this Court said:

> "The limits of the power to issue regulations are well settled. *International R. Co. vs. Davidson*, 257 U. S. 506, 514, 66 L. Ed. 341, 343, 42 Sup. Ct. Rep. 179. They may not extend a statute or modify its provisions." (281 U. S. 609-610.)

The principle involved in what was said in *Payne vs. Railway Pub. Co.*, 20 App. D. C. 581, 597 (writ dismissed, 192 U. S. 601), is equally applicable to statutory duties imposed upon postmasters, to liability under bonds given for the

faithful discharge of duties, and to remedies available for the enforcement of such liability:

> "It is very clear that the Congress of the United States has not committed to the Postmaster General, or to any one else, the matter of determining what should be carried in the mails as second-class matter, and what is matter of the third class. *It has reserved that power exclusively to itself.* * * * And it is not competent for the Postmaster General to add anything to the statute or to take anything from it." (Italics supplied.)

If the action of Congress in classifying mail is to be deemed to exclude departmental regulations, for much stronger reasons regulations can neither add to nor detract from Congress' expressed intention that a postmaster's bond shall operate to the benefit of mail-users, and cannot alter the Congressional will or intent that mail-users shall be permitted to sue on the bond, even though such will or intent arises from implication rather than explicit provision.

Meads vs. United States (C. C. A. 6), 81 Fed. 684, was an action on a federal land office receiver's bond. The effect of departmental regulations upon the scope of liability existing under the bond was considered. The Court quoted from *United States vs. Symonds*, 120 U. S. 49, 30 L. Ed. 557, where this Court observed that the power of the Secretary of the Navy to issue regulations was "subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress;" and that the Secretary might "establish regulations in execution of, or supplementary to, *but not in conflict with, the statutes defining his powers or conferring rights upon others.*" (Italics supplied.) Applying the principle thus laid down by this Court to regulations affecting official

bonds, the Circuit Court of Appeals, in the cited case, said:

> "In what was thus said it is implied that the general laws of Congress *with respect to the rights of the public in dealing with these official agencies, as well as the obligations arising out of the execution of these bonds, and the rights of the Government thereunder*, cannot be changed *by mere department regulation.*" (Italics supplied.)

It is to be noted that the Circuit Court of Appeals does not limit its holding to a decision that there was no breach of the bond in the case at bar, but broadly holds that in no case can a private mail-user sue on a postmaster's bond. Manifestly, such a decision should rest on broader considerations than the mere effect of Sec. 777 of the Postal Laws and Regulations. Otherwise, a postmaster would not be liable on his bond for the most culpable mishandling of mail —not even for malicious destruction of private letters. There should be ample room for judicial determination whether or not a particular act constitutes a breach of duty toward a mail-user, but no room left for doubting the liability of the bond for any loss directly caused by any breach of duty by the postmaster, whether the wrong be against the Government or a private mail-user.

For regulations of the Postmaster General that have a bearing on the issues presented, but which are overlooked by the Circuit Court of Appeals' opinion, see pages 9-10 of this brief. The opinion does not take into account the postal *statutes* cited and summarized at pages 7-9 hereof, under the subhead, "Statutes Concerning Mail Delivery."

IV.

The Bond Coverage Is as Broad as the Postmaster's Liability in Tort to Mail-Users.

(See Assignments of Error Nos. 4, 8.)

By observing "that this is not an action against the postmaster sounding in tort" (R. 104; 103 Fed. (2d) 451), the Circuit Court of Appeals intimates that a postmaster may be personally liable to mail-users in tort for failure faithfully to discharge certain duties imposed upon him by law, or departmental regulations, but that his bond will not cover those duties, although it be conditioned for the faithful performance of *all* of his duties imposed by law or regulation. We respectfully submit that if the Court really meant to say that we could have sued in tort, but could not sue on the bond, the conclusion is contrary to well-settled law.

The last quoted observation by the Circuit Court of Appeals intimates recognition that the Record shows that the postmaster rendered himself liable in tort. In the next subdivision of this brief we comment upon the state of the Record in that regard.

Howard vs. United States, 184 U. S. 676, holds that an official who breaches his official duty to the prejudice of a private person is liable on his bond conditioned for the faithful discharge of his duties. Numerous decisions in the state and federal courts, which have followed the *Howard Case* (see citations in *Rose's Notes* and in *Shepard's United States Citations*), show that the *Howard Case* has been generally regarded by the courts throughout the country, both state and federal, as stating a general rule, and not an exception to a general rule. This is instanced by what the Circuit Court of Appeals, Seventh Circuit, said concerning

that case in *Moody vs. Meyer*, 41 Fed. (2d) 515: "This case states a general rule." Of course, it is true as held in the last cited case, that "there can be no liability on an official bond, unless there is a breach of official duty" (p. 516). But is it not equally true, as a converse proposition, that there *is* liability on a bond, like the one at bar, when there is a breach of official duty?

Does not 39 *U. S. C. A.*, Sec. 34, manifest a purpose to require *security*, to a limited amount, for the discharge of the same liability that would rest upon a postmaster if he were sued in tort instead of on his bond? In other words, is not his secured liability at least as broad as his unsecured liability?

First, the statute says that the bond shall be "in such penalty as the Postmaster General *shall deem sufficient*." This gives better opportunity for securing both the Government and private persons than was possible under the statute involved in *Howard vs. United States*, 184 U. S. 676, where no bond in excess of $40,000 could have been required.

Second, the statute does not limit the coverage to duties prescribed by the postal *statutes* and regulations. It covers "all duties and trusts imposed on him either by *law* or the rules and regulations of the department."

The phrase, "duties * * * imposed * * * by *law*," include the postmaster's duties under the common law, as well as those rising out of statutes.

In *State vs. Dyer*, 67 Vt. 690, the Court said of a statute which designated the institutions to which commitment of prisoners should be made, for criminal offenses "declared by law":

> "The words 'declared by law' do not necessarily or reasonably mean statute law only, but include the com-

> mon law whenever it defines an offense and makes it punishable by imprisonment."

In civil matters, at least, unqualified use of the term "law" embraces both statutes and the common law.

Tennessee Coal, etc., R. Co. vs. Roussell, 155 Ala. 435.

In re Finks (D. C., W. D., Va.), 41 Fed. 383, the Court recognized that the "duties" for the performance of which a Federal Court clerk is bonded are not limited to statutory duties, but include, also, duties daily performed by him, though not of statutory origin.

That an administrative federal official may be held liable for violation of a duty that inheres in his office, although not *specifically* imposed by law or regulation, was also recognized in *Sclover vs. Shardown*, 73 Minn. 393. There a Federal Circuit Court clerk was held liable in tort for negligently misinforming an attorney that judgment in a certain case had not been entered. From the fact that a statutory fee was collectible by the clerk for making a judgment search, the Minnesota Supreme Court decided that it was the clerk's official duty to furnish plaintiff with correct information. The Court said:

> "It is a general rule that wherever an individual has suffered injury from the negligence of a ministerial officer, in the discharge of a special duty to himself, an action lies on behalf of the party injured, for the action is founded, not on contract, but on breach of duty.",

So, if there were no statute or regulation expressly forbidding a postmaster to destroy a private letter coming into his hands for delivery, or as in the case at bar, virtually to destroy it by deliberately delivering it to a person not en-

titled to it, the postmaster nevertheless would be guilty of a breach of duty imposed by *law*.

Third, the last sentence of the statute—39 *U. S. C. A.*, Sec. 34—clearly indicates that Congress intended that the coverage of a postmaster's bond should be at least as broad as his tort liability. That sentence reads: "The bond of any married woman who may be appointed postmaster shall be binding upon her and her sureties, *and she shall be liable for misconduct in office as if she were sole.*" The implication that Congress had in mind the well-established doctrine (see Point V, *post*) that a man or a single woman, serving as postmaster, is liable in tort to private persons for *official misconduct* toward them is unavoidable. So, we have within the scope of a single section, first a requirement for *security* for the faithful discharge of all *official duties*, and then a recognition of liability of all postmasters, in tort, for *misconduct in office*. Clearly, the phrase, "misconduct in office," in the last sentence of the statute, is merely the converse of the phrase, "faithful discharge of all duties," etc., in the first sentence.

The following authorities show that the Courts generally regard *breach of official duty* and *official misconduct* as not only meaning the same thing, but as covering wrongs against individuals as well as wrongs against Government:

National Surety Co. vs. State Savings Bank (C. C. A. 8), 156 Fed. 21, 23-24, where the Court treated "official delinquency" as the equivalent of "misconduct in office."

Miller vs. Roby, 6 Neb. 471.

Etzler vs. Brown, 58 Fla. 221.

State vs. Examining and Trial Board, 43 Mont. 389.

Even if the statute had not contained an explicit recogni-

tion by Congress of a postmaster's tort liability, in such context as to express intention to treat bond coverage as extending to the full scope of tort liability, the same result would follow as a matter of necessary inference. Failure faithfully to discharge a postmaster's duties is the principal ground on which liability is enforceable whether recovery be sought on his bond or in tort.

Such was the position taken in *United States vs. Griswold*, 8 Ariz. 153, where the Court said:

> "It is a part of the duty of the postmaster to safely keep and to transmit the mails, including registered packages, which may be given into his hands as such postmaster. His oath of office requires him to faithfully perform the duties of his office. It is a general proposition that a public officer, having ministerial duties to perform, is liable for any injury occasioned by him in consequence of his failure to perform his official duty. *Raynsford vs. Phelps*, 43 Mich. 344, 5 N. W. 403, 38 Am. Rep. 189. *Thus it has been held that a postmaster is liable in damages for conversion of mail matter at the suit of the person injured. Teal vs. Felton*, 12 How. 284, 13 L. Ed. 990. It has also been held that a postmaster is liable for the loss of a letter containing money, occasioned by his negligence, at the suit of the sender. *Dunforan vs. Grant*, 14 Vt. 283, 39 Am. Dec. 224. *If a Postmaster can be held responsible in damages for loss of mail matter occasioned by his negligence, it must be for the reason that he has been derelict in his duty as such officer. Such a failure, under the condition of his official bond that he will 'faithfully discharge the duties of his office,' amounts to a breach of the bond; and in such a case the liability of the principal is the measure of the liability of the surety.*" (Italics supplied.)

United States vs. Roade (D. C., S. D.), 214 Fed. 283, was an action against a postmaster on his bond for loss of a reg-

ered package, for which loss he was not personally at fault. Relating the postmaster's tort liability to the liability on his bond, the Court said:

"My attention is specifically called by plaintiff to plaintiff's claim that the condition of the bond is breached by admitting the receipt of the registered parcel, and the refusal and failure of the postmaster to deliver the registered parcel, on demand of the addressee. The evident reply to this, in the light of my construction of the rules and regulations, is that they do not hold the postmaster responsible, or the postmaster and his bondsmen liable upon their bond, for the wrong delivery; depredation upon, or loss of any registered letter or parcel, while in the postmaster's custody, *unless such wrong delivery, depredation, or loss is due to negligence or disregard of the regulations by such postmaster.*" (Italics supplied.)

An official bond covers a tort committed under color of office.

Pierce vs. Chapman, 167 Miss. 749.

22 *R. C. L.*, p. 506, Sec. 190.

From *Taylor vs. Shields*, 183 Ky. 669:

"Where there is a duty imposed by law on a police officer, * * * if the duty is neglected, or performed in an improper manner, the surety is liable."

From *Stronk vs. Ocheltree*, 11 Iowa 158, 159-160:

"He did this as an official act. The wrong was committed by color of his office, a wrong which his sureties obligated themselves he would not do, and for which they should be held responsible."

From *County of Mower vs. American Bonding Co.*, 133 Minn. 274, 276-277:

"The cases involving the liability of sureties for default of public officers are numerous and the decisions conflicting. *The courts agree, however, in holding sureties liable for unfaithful or improper conduct of officers in the performance of acts or duties which the law authorized or required him to perform.* This court, following the weight of authority, also holds the surety liable for a trespass upon person or property committed by the officer while acting within the scope of his official authority, and while purporting to act in his official capacity." (Italics supplied.)

Therefore, we are brought within a well-established legal principle that, except as otherwise clearly provided, the law intends that liability on an official bond to discharge duties shall be *co-extensive with the liability of the officer himself.* In addition to authorities above cited in this subdivision, see, also:

Seneca Independent School District vs. Traver, 63 S. D. 68.

50 C. J. 74, Sec. 127.

Whittaker vs. United States Fidelity & Guaranty Co. (D. C., Mont.), 300 Fed. 129.

Fayette Title & Trust Co. vs. Maryland, etc. (C. C., W. D., Pa.), 180 Fed. 928.

People vs. Schuyler, 4 N. Y. 173.

Skinner vs. Phillips, 4 Mass. 69.

Harris vs. Hanson, 11 Maine 241.

People vs. Merserean, 74 Mich. 687.

Hall vs. Tierney, 89 Minn. 407.

American Guaranty Co. vs. McVicee, 111 Ohio St. 532.

Richland County vs. American Surety Co., 92 S. C. 329.

In *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, where the surety was held liable on a letter carrier's

bond for mishandling of letters, in violation of regulations adopted after the bond was given, the Court said:

> "But the contract of a surety, like all other contracts, must have a reasonable construction—an interpretation, which, while it carefully restricts his responsibility to that which he agreed to undertake, does not fail to hold him to that liability, which by the plain terms of the contract he agreed to assume. The surety in the case in hand agreed with the United States to be liable for the faithful discharge by its principal, Eich, of all the duties and trusts imposed upon him as a letter carrier either by the postal laws of the United States, or by the rules and regulations of the Post Office Department," etc.

The Court's decision in *National Surety Co. vs. United States*, 129 Fed. 70, *supra*, was followed in *Gibson vs. United States* (C. C. A. 1), 208 Fed. 534, an action on a postmaster's bond. Holding that a bond, conditioned substantially the same as the one at bar, covered losses by senders of mail, regardless of the Government's liability to the senders, the Court said:

> "Should the government be allowed so to recover, it would hold the amount recovered upon an implied trust for the owners of the property. To allow such a recovery would not, in our opinion, be holding the sureties to any liability not clearly within the reasonable contemplation and the intention of the parties when the bond was given."

The decisions in the two cases last cited conclusively settle the point that when the surety in the case at bar executed the bond it rendered itself *liable* for the mishandling of the plaintiff's mail. It was bound to foresee that that liability would be enforced in such action as the law should permit

to be brought. The right of the Government to sue for the benefit of users of the mail had been judicially determined in the cases last cited, and other cases herein cited. And this Court had held in *Howard vs. United States*, 184 U. S. 676, that a private beneficiary of such a bond as this may sue on it in his own right. So, not only was the *substantive* right of the plaintiff a matter within the contemplation of the parties to the bond at bar, but also plaintiff's *remedial* right.

The surety being a compensated surety, its undertaking must be most strongly construed in favor of claimants against the bond, although they are not formal parties to it.

50 *C. J.* 80, Sec. 133.

77 A. *L. R.* 42-46, 49.

Even under the strictest construction of the liability of the surety, the liability must be held to extend to losses sustained by senders of mail.

United States vs. Griswold, 8 Ariz. 453.

In *American Surety Co. vs. United States* (C. C. A. 5), 133 Fed. 1019, the case was decided in a memorandum opinion based upon the decision *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, and upon 28 *Op. Atty. Gen.* 476, 479.

The Attorney General's opinion, to which reference is made in the *American Surety Co. Case*, was rendered by Hon. Philander C. Knox. It dealt with the right of the Government to recover on a postal clerk's bond for the full loss resulting from his theft of a private registered letter, where the Government's liability to the sender was limited. In part, the opinion reads:

"* * * the contract is not one of strict and narrow indemnity, and whether it is called one of suretyship or fidelity insurance, its meaning and purpose are clear, viz., to assure the faithful performance of all the employee's duties, and the result, to a plain understanding, is the assumption by the obligor of liability for the consequences of all failures of the principal to perform his obligations up to the amount of the principal sum named in the bond. * * * the contract broadly covers all trusts and obligations imposed and must contemplate and include all consequences of a breach of the plainly expressed condition. I think it will be clear from present consideration of the language of the law and the bond, and in view of the well-known dealing and policy of the Government toward its dishonest employees and those who are losers by their dishonesty, that if the intention had been to limit the surety's liability to the amount of the Government's strict legal liability, the language of the instrument would have been different."

23 *Op. Atty. Gen.* 476, 479-481.

The rule that a bond for the faithful performance of an employee's duties is to be construed most strongly against the sureties applies to official bonds.

Carlton vs. Detroit Fidelity & Surety Co., 112 Fla. 644.

In *National Surety Corp. vs. Seward*, 31 Ohio App. 206, where a postmaster's surety was held to be entitled to be reimbursed for a discharge of his primary liability, the Court said:

"We assume that the plaintiff was a paid surety, and that the transaction amounted to a contract of fidelity insurance. In such case, for the purpose of determining the liability of the surety to the United States, the contract should be construed according to the rules applicable to insurance contracts. *George A. Hormel & Co. vs. American Bonding Co.*, 112 Minn. 288."

Concerning a county auditor's bond, conditioned for faithful performance of his official duties, it was said in *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 407-408:

> "And another suggestion occurs that *this rule of strictissimi juris applies rather to the words of the bond as written and signed by the sureties, and is not to be extended to modify the language of the statute defining the duties in such a way that it would not be modified if no question of suretyship were involved.* The construction of the words of the statute must be the same in either event." (Italics supplied.)

What was said in *United States vs. Bryan* (C. C., N. D., Cal.), 82 Fed. 290, 294, affirmed (C. C. A. 9), 90 Fed. 473, concerning reasons for holding a postmaster liable on his bond for acts of his subordinates, suggests still better reasons for imposing strict liability for his own deliberate wrongs:

> "A full appreciation of the absolute liability will tend to greater vigilance and scrutiny on the part of postmasters over the acts of their subordinates, and *will tend to preserve the efficiency of the postal service. Any other rule would lay the door wide open for frauds, which could be practiced with impunity, to the demoralization of the service.*"

The statutes which make certain acts by a postmaster criminal offenses are indicative of the legislative intent that those acts be covered by his official bond.

In *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 409, the Court declared concerning a county auditor's bond for faithful discharge of his duties:

> "It was deemed advisable, in compelling the officer to act faithfully and honestly in such a matter, to enforce

that fidelity and honesty by criminal penalties; and, *while the penal statute adds nothing to the civil bond, it is a very important circumstance to evince the solution that the legislature of Ohio gives to the question whether such conduct is ex virtute officii or colore officii, or so much on the outside that it does not belong to the office at all. It is a legislative construction of the laws of Ohio and of the official bonds that are required to be given. It punishes the officer for a malfeasance in office also, even if it is a punishment to the individual as well for an offense against him who is injured. It goes to both wrongs.*" (Italics supplied.)

From *State vs. McGuire*, 46 W. Va. 338:

"Sureties stand 'on the letter of the bond,' it is true, and it cannot be stretched as a general rule; but the law in force at the execution of the bond, giving it a certain legal effect, is part of the bond, and sureties engage with eyes open to that law."

An official's sureties stand in the shoes of the official. "Regardless of the form of the action, such suit is bottomed on the tortious acts of the public officer," etc.

Pullman Car & Mfg. Corp. vs. Hamilton, 236 Ala. 209.

IV (a).

The Record Shows That Defendant Postmaster Rendered Himself Liable in Tort to Plaintiff.

So far as the postmaster is concerned, for present purposes, there does not appear to be any claim that he did not become liable to plaintiff for his wrongful acts. After the action was ordered dismissed as to the surety (R. 87), the lower court ordered dismissal as to the postmaster, on the sole ground that, with the surety out of the case, the Court

was without jurisdiction to proceed against the postmaster (R. 88). The latter order was, of course, made on the ground that an action between plaintiff and the postmaster would present no diversity of citizenship. (Since the action arises under the federal laws it would seem that jurisdiction of the action existed regardless of diversity of citizenship.)

The trial judge stated in his opinion:

> "The jury found that Malone's *wrongdoing* was the direct cause of plaintiff's loss; that Malone *violated his duties as postmaster;* and that, *as the proximate result of such violation, the plaintiff sustained a money loss,* at least to the extent of the penal sum of the bond, which was the amount of the verdict" (R. 72). (Italics supplied.)

The postmaster's liability in tort to plaintiff on the facts found by the jury does not appear to be questioned. The surety tacitly conceded such liability in its motion for a directed verdict, for that motion was made, in part, on the ground "that the evidence negatives any misconduct, carelessness or violation of rules by the defendant Malone," etc. (R. 55). The surety nowhere asserted in its motion that Malone was not liable if he was guilty of misconduct, violation of rules, etc. (R. 54-55, 61-62). The surety's motion to dismiss the complaint (R. 64-65) on which the order appealed from was based (R. 70-87) is even narrower than the motion for a directed verdict, in that it did not specifically assert any non-liability on Malone's part. Nor did the surety's answer (R. 30-32) assert any such non-liability on Malone's part.

As to the postmaster's answer and motions, they did not deny liability on the ground that his wrongful acts would

not make him liable to plaintiff. His answer is devoid of any such claim (R. 32-34). He adopted the surety's motions for a directed verdict as his motions (R. 55; 63), with an added assertion that his defaults, if any, were not the proximate cause of plaintiff's loss (R. 63). The postmaster's motion to dismiss the Complaint (R. 65-66), which as above noted was granted on the sole ground that there was no diversity of citizenship, with the Surety Company out of the case, does not question the liability of a postmaster to a user of the mails, apart from liability created by his bond.

V.

That Postmasters Are Directly Liable for Their Wrongs Against Mail-Users Is an Old and Well-Established Doctrine.

(See Assignments of Error Nos. 5, 8.)

In Subdivision VII (b), *post*, we draw attention to the fact that our postal system originated in the British system; and to a general recognition that both systems exist primarily for the benefit of the people, and that postmasters are regarded in all English-speaking countries as servants of the people. Therefore, the Empire reports, as well as the American reports, aid in sensing a generally recognized policy to make postmasters responsible for their wrongs, directly to those wronged. Incidentally it will be discovered that the policy is as old as the modern postal system itself.

> "The duty arises out of a great public trust, since the legislative establishment of the post office by the Statutes of Charles the Second and Queen Anne. * * *
>
> "We think that, in all cases, deputies"—the counterpart of American postmasters—"are answerable for

their own personal misfeasance, such as detaining the letters in question."

Rowning vs. Goodchild, 2 Wm. Bl. 906, 96 Reprint 536, 3 Wils. C. P. 443, 95 Reprint 1147.

In the cited case, it was held that a postmaster was liable for failing to deliver letters to an addressee at the addressee's place of abode.

Accordingly:

Smith vs. Dennis, or Dennison, Lofft 753.

Barnes vs. Foley, 4 Burr. 2149, 5 Burr. 2711, 1 Wm. Bl. 643.

Smith vs. Povelich, 1 Cowp. 182.

Stock vs. Harris, 5 Burr. 2709.

Edwards vs. Dickenson, 12 Mod. 6.

Carey vs. Lawless, 13 U. C. Q. B. 285.

Campbell vs. McPherson, 6 U. C. (O. S.) 34.

Bainbridge vs. Postmaster-General (1906), 1 K. B. 178, 75 L. J. K. B. 366, recognizes the liability of a postmaster "for any fault of his own."

From Lord Mansfield's opinion in *Whitfield vs. Despencer* (K. B.), 2 Cowp. 754, it appears that interference by a postmaster or postal employee with the safe flow of private mail has long been regarded as a serious wrong against mail-users. After a mail sorter had been executed for stealing a bank note from a letter, it was sought to hold the Postmaster General liable in damages for plaintiff's (the sender's) resulting loss. Defendant escaped liability only on the ground that he was not liable for the wrongful acts of his subordinates, in which he had not participated. It was observed that the giving of security to the Crown by inferior postal officials afforded one good reason for exempt-

ing the superior from liability for their acts. But it was pointed out that a postmaster was liable for his own fault. The Court said:

> "As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office loses any of them, he is answerable. * * * So is the postmaster for any fault of his own."

The last cited case followed *Lane vs. Cotton*, 1 Com. 100, 12 Mod. 47 (2 Mod. 108, 5 Mod. 455), 1 Salk. 17, 143, Carth. 487, Holt K. B. 582, 1 Ld. Raym. 646.

In Australia a postmaster escaped liability for wrongful stoppage of plaintiff's mail, because the wrong was committed without his direction or knowledge.

Bell vs. Duffy (Victoria Sup. Ct., 1898), 4 Argus L. R. (Current Notes) 57.

American Decisions.

"The doctrine of these English cases has been recognized in this country and applied to the post-office department of the United States: *Dunlop vs. Munroe*, 7 Cranch 242; *Schroyer vs. Lynch*, 8 Watts. 453; *Conwell vs. Voorhees*, 13 Ohio 523."

Hutchins vs. Brackett, 22 N. H. 248.

As early as 1812 this Court intimated the liability of a postmaster for the mishandling of mail, through his own negligence or wrongdoing. The intimation appears in *Dunlop vs. Munroe*, 7 Cranch 242, an action against a postmaster for wrongfully withholding a letter containing bank notes. The Court found (p. 269) that the question present-

ed was "whether, when the issue is taken upon the neglect of the postmaster himself, it is competent to give in evidence neglect in the assistant acting under him. * * *" The Court decided:

> "If it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and *his liability then will only result from his own neglect* in not properly superintending the discharge of their duties in his office." (Italics supplied.)

From the notes appended to the report of the cited case, at 3 L. Ed. 329, we quote:

> "A postmaster is not liable for the malfeasance or embezzlement of his clerks or deputies, nor for the contents of a lost letter, *unless he has been guilty of negligence*, and the loss was the consequence of such negligence. *Wiggins vs. Hathaway*, 6 Barb. 632.
>
> "Deputy-postmasters are not liable, except for loss caused by their own fault or negligence; *and for that they are liable. Rowning vs. Goodchild*, 3 Wils. 443; *Maxwell vs. McClory*, 2 Bibb. 211; *Christy vs. Smith*, 23 Vt. 663; *Bolan vs. Williamson*, 2 Bay. 551; S. C. 1 Brevard 181; 2 Pars. on Cont. 144." (Italics supplied.)

(Note: It will be observed that some of the early American cases cited in this brief refer to postmasters as "deputy-postmasters," because originally all postmasters were regarded as deputies of the Postmaster General, both in England and in this country.)

In *Teal vs. Felton*, 12 How. 284, this Court decided that the wrongful withholding of mail matter by a postmaster from an addressee was a conversion for which suit might be brought against the postmaster by the addressee. For like reasons, a postmaster's wrongful delivery of letters to an

unauthorized person, in violation of departmental regulations, must also be actionable.

Keenan vs. Southworth, 110 Mass. 474, was an action in tort against a postmaster for loss of a letter addressed to plaintiff. The loss was due to neglect of the postmaster's clerk, and plaintiff exonerated the postmaster of "any actual participancy or knowledge." The Court said:

> "The law is well settled, in England and America, that the postmaster general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders."

In *Coleman vs. Frazier*, 4 Rich. (S. C.) 146, a postmaster was held liable to the sender of a letter for pilferage of the letter by one who was permitted to have access to mail, in violation of postal regulations.

In *Wentworth vs. Smith*, 44 N. H. 419, evidence was offered to show that letters received at the post office of which defendant was postmaster had been put into drawers of persons to whom they were not addressed, and that other letters were delivered to persons other than the addressees. This evidence was held not admissible to show that a particular letter had been negligently handled, because negligence in a specific instance could not be proved by negligence in other instances. But the opinion shows, by necessary inference, that if it had been proved that loss had resulted from delivery of the particular letter to an unauthorized person, the postmaster would have been liable.

It was just as much incumbent upon the defendant postmaster to know that he had no right to deliver plaintiff's mail to Hunting, unless it was addressed to him, as it was

incumbent upon the postmaster in *Bishop vs. Williamson*, 11 Me. 495, 507, to know that he had no right to permit one to have access to mail in the office unless that person had been sworn in as an assistant. There the postmaster was held liable in damages for misdelivery of a letter.

The right of an addressee of mail to hold a postmaster liable in damages for detention of mail not authorized by statute, was intimated in *Commerford vs. Thompson* (C. C., Ky.), 1 Fed. 417, 422, although injunction against the detention was denied for want of equity arising through lack of a showing that the letters did not pertain to a lottery business conducted by plaintiff.

In *Polk vs. Garrison*, 162 Ark. 624, one Bomb forged plaintiff's signature to a telegram requesting a bank to send plaintiff a sum of money by registered mail. By impersonating plaintiff, Bomb secured the letter from the post office of which defendant was postmaster and misappropriated the money. The Court held that plaintiff could not recover from defendant postmaster, because plaintiff had sent nothing through the mails and had authorized nothing to be so sent. The Court said that if plaintiff had ordered the money sent to himself, misdelivery to one impersonating him would have rendered the postmaster liable. The Court left undecided the question whether the bank could recover from the postmaster.

In *Raisler vs. Oliver*, 97 Ala. 710, the Court recognized that a postmaster is liable for mishandling of letters where it is proved that loss results to a mail-user as a direct consequence of the postmaster's failure to "exercise that care and prudence in regard to the letters that a reasonable and prudent man would in regard to his own business."

Ford vs. Parker, 4 Oh. St. 576, is to the same effect.

A postmaster is liable for loss of mail resulting from his neglect properly to superintend his office.

Schroyer vs. Lynch, 8 Watts, (Pa.) 453.

In addition to the above cited authorities, see the following cases which sustain the point under argument, and which have been hereinbefore cited as showing that bond liability and tort liability are correlated:

United States vs. Rogde (D. C., S. D.), 214 Fed. 283.

United States vs. Griswold, 8 Ariz. 453.

Gibson vs. United States (C. C. A. 1), 208 Fed. 534.

VI.

The Degree of the Postmaster's Culpability Is Unimportant.

(See Assignment of Error No. 2.)

Defendant postmaster deliberately delivered to Hunting letters to which the latter was not entitled under the postal laws and regulations (R. 71-72; 23 Fed. Supp. 412-413). Therefore, this appeal does not present any question as to liability on a postmaster's bond when he acts inadvertently.

That defendant Malone, in violation of his duties as postmaster, wrongfully misdelivered plaintiff's mail is undisputed and indisputable upon the record (R. 72). As to the degree of his culpability, the most favorable consideration that he or his surety can claim is afforded by the trial judge's statement of these facts: "The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not *directly* establish that Malone was knowingly a party to the *fraud*. [Here the trial judge refers to Hunting's fraud against plaintiff.] Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to

convince Malone that it was perfectly proper for the 'Midland mail' to be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster," etc.

The surety's argument at page 18 of its brief presented to this Court in reply to our petition for certiorari indicates that it will continue reliance on an assumption that Postmaster Malone did not know what was in the letters which he wrongfully delivered to Hunting. Our answer to that position is:

1. The finding that there was no *testimony directly* showing that the postmaster knew just what sort of fraud Hunting was perpetrating on plaintiff does not negative the existence of *circumstantial evidence* warranting a finding that Malone did have such knowledge. In fact, there was circumstantial evidence from which the jury could infer that the postmaster knowingly was a party to the fraud:

> "The testimony indicated *Malone knew of Hunting's business relations with the plaintiff*," etc. (R. 72). (Italics supplied.)

At pages 8-9 of its reply to the petition for certiorari, the surety seeks to avoid a consideration of this phase of the case because the evidence bearing on it is not shown by the Record. We reply that the statement of facts made by the trial judge (R. 72), from which the Circuit Court of Appeals derived its statement of facts (R. 103), sufficiently shows that the postmaster knew that Hunting was an *automobile dealer* and that the diverted mail was being sent by a

"loan finance company." Those two facts, also, were sufficient to apprise the postmaster as to the probable nature of the correspondence, and Hunting's request that the correspondence be delivered to him compelled a suspicion that Hunting was actuated by some unlawful purpose prejudicial to plaintiff that could be effectuated only through the postmaster's co-operation.

2. The postmaster's violation of his official duties was an actionable breach of his bond, whether he knew the contents of the letters or not and whether he knew or did not know what purpose the wrongful diversion of the mail served Hunting.

3. Obviously, his wrongful diversion of the mail is not excusable on the ground of Hunting's "dominant personality." As shown by *Commerford vs. Thompson*, 1 Fed. 417, 419, not even the dominating influence of the Postmaster General could have justified the postmaster in delivering plaintiff's mail to a person other than the addressee.

That the gist of the postmaster's wrong lay in the diversion of the mail from the addressees, regardless of what he knew about their contents, appears from the penal provisions of 18 *U. S. C. A.*, Sec. 318:

> "Whoever, being a postmaster * * * shall unlawfully *detain, delay* * * * any letter * * * which shall come into his possession, and which was intended to be * * * delivered from any post office; * * * or shall *secrete, embezzle or destroy* any such letter, * * * shall be fined not more than $500, or imprisoned not more than five years, or both." (Italics supplied.)

It will be noted that this statute does not make knowledge on the part of the postmaster as to the nature of the contents of a letter an element of the offense, and no reason is

apparent why such knowledge should be regarded as important where he and his surety are sought to be held civilly liable. For the purposes of this action, we assert that the spirit of this statute, if not its letter, shows that Congress regards it as being a gross breach of a postmaster's official duty to impede the delivery of the mail to the addressee or its return to the sender, whose return card appears on the envelope, regardless of the postmaster's knowledge as to the contents of the letter.

Postmasters and postal employees have no right to speculate upon the importance of letters; their duty is to deliver them to the addressees or put them through the regular channel provided for undeliverable mail.

Goode vs. United States, 459 U. S. 663, 671.

Even when a postmaster is prosecuted for violating 18 *U. S. C. A.*, Sec. 318, by detaining, delaying or embezzling a letter, it is no defense that the letter contained nothing of value.

United States vs. Lachner, 134 U. S. 624.

United States vs. Gruver (D. C., S. C.), 35 Fed. 59, 61.

United States vs. Delany (C. C., S. C.), 55 Fed. 475, 476.

Not even a good-faith belief that a letter contains nothing of value to the addressee will justify its delivery to an intermeddler.

United States vs. Nutt (D. C., Ohio), Fed. Cas. No. 15,904.

That "Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and * * * was able to convince Malone that it was perfectly proper

for the 'Midland mail' to be delivered to him" (R. 72), can afford no semblance of excuse for Malone's violation of the statutes and regulations governing his duties in the handling of mail. It affords less semblance of excuse than was involved in *United States vs. Moore* (C. C. A. 2), 168 Fed. 36, also an action on a postmaster's bond. It was there decided that the postmaster was bound to take notice of a statute that forbade detailing of clerks from any branch of the postal service to the offices of the Department in Washington, and that he was liable on his bond for enabling clerks, *whom he had appointed in his office on order of the Post Office Department*, and who rendered no service there, to secure pay. The Court said (p. 38), that defendant was "charged with knowledge of this statute whether he was aware of it or not." The Court added:

> "The defendant acted in entire good faith, without any purpose or intent of defrauding the government. He supposed that his superior officers were more familiar than he was with the voluminous and complicated statutes and regulations of the department, and followed their instructions with no suspicion that his doing so was any breach of duty. * * *
>
> "Unfortunately for him, entire good faith and the most honest intentions are no defense."

Had the postal laws vested the postmaster with *discretion* in delivering mail, and had the postmaster in this case merely erred in a *bona fide* attempt to *perform* his official duties, a different legal situation might have been presented. But, as shown by the statutes and regulations set forth in the Statement of the Case, no discretion was vested in him concerning the delivery of letters. The performance of his duty bound him to return the plaintiff's letters to plaintiff if they were not delivered to the persons addressed.

A postmaster is immune from liability to mail-users where he acts *within* an authority conferred upon him, but when he steps *outside* the authority conferred upon him he becomes a tort feasor.

Literary Recreations, Limited, vs. Saure (B. C., 1932), 4 D. L. R. 553, 3 W. W. R. 423, 58 Can. C. C. 385.

In the cited case, a Postmaster General and his subordinate claimed immunity from suit at the hands of a mail-user on the ground that they were responsible only to the Crown and Parliament. Mr. Justice M. A. Macdonald replied:

> "If we had no statute limiting authority and the act complained of was a political act of state performed pursuant to sovereign authority other considerations would arise. Where, however, authority is defined by statute or by a commission, we must look in that quarter for justification for the act attempted or performed. Even if acting for the Crown, the agent would be responsible for tortious acts. He might be indemnified but the right to compensation by the party injured is beyond question. * * *
>
> "To hold otherwise would be to seriously interfere with the rights and liberty of the subject."

From *United States vs. Perkins* (C. C. A. 8), 280 Fed. 546, 549:

> "Sureties on official bonds are liable for negligence or malfeasance of their principal in the performance of acts which are done *virtute officii*. The bond providing only for the faithful discharge of the principal of his official duties, the condition of the bond is considered to have been broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does [not?] involve the exercise of discretion, and, where the duty

which has not been faithfully discharged was owing to the person injured, such person may sue on the bond. By the weight of authority, acts done by color of office are regarded as acts for which sureties on official [bonds] are liable. * * * The acts here complained of fall within this category, and particularly so in view of the charge that they were done with wrongful intent and purpose."

A position adopted by the surety in its brief before the Circuit Court of Appeals impels us to anticipate a possible renewal of the contention in this Court. It was claimed below that the Government, "the obligee named in the bond, after due inquiry, determined that no default existed under it," and subsequently elevated defendant Malone from acting postmaster to postmaster; and that "Malone's conduct of his official duties has been fully ratified and affirmed," etc. Nothing in the Record can be cited, in support of these contentions by the surety, excepting the bare reference, incidentally made by the trial judge in another connection, concerning "a new bond obtained when Malone was elevated from Acting Postmaster to Postmaster" (R. 84).

So far as the surety may argue that the Government's postal inspector or other administrative officers have found that the Government has sustained no loss through the postmaster's misconduct; that, therefore, it has no claim on the bond in suit; and that it has no right or duty to sue on the bond on plaintiff's behalf, those considerations strengthen our right to sue, as hereinafter shown. But the contentions seem to go farther than that by seeking to deny relief to plaintiff on a theory that the Government's postal administrative officers have "whitewashed" the postmaster under such circumstances as to nullify the jury's findings mentioned by the trial judge concerning the postmaster's mis-

conduct and the damage proximately resulting to plaintiff therefrom. To such possible argument we answer:

(1) There are no such exceptions or appeal before this Court by defendants as to permit a review of the fact findings set forth by the trial judge.

(2) There is nothing in the Record to show that the merits of the postmaster's acts have been the subject of departmental inquiry, "due" or otherwise, nor that "the conduct of his official duties has been fully ratified and affirmed," excepting as an inference may be drawn from the mere fact of his securing a new commission as postmaster.

(3) There is no showing that, if the Department investigated the postmaster's acts in handling the plaintiff's mail at all, the investigation was conducted with the thoroughness that characterized the trial of this case before a jury.

(4) Obviously, whatever may be the force of inferences to be drawn from Malone's elevation to full-fledged postmastership after the misconduct found by the jury to have been committed by him, the inferences are impotent so far as detracting from the jury's findings. There is no ground for a claim that the Department had jurisdiction to foreclose plaintiff's appeal to the courts on the question of whether or not Malone was guilty of misconduct as acting postmaster, nor for a claim that plaintiff was made a party to an investigation by the Department or given any opportunity to present the facts without which no efficient investigation could proceed.

This Court has decided that the Government's retention of a postmaster after knowing that he has embezzled funds does not discharge his surety from liability on a later embezzlement. (*Jones vs. United States*, 18 Wall. 662.)

VII.

The SPIRIT, as Well as the Letter, of the Statute Requires That a Postmaster's Bond Be Deemed to Cover Mail-Users' Losses, as Well as Losses of the Government.

(See Assignment of Error No. 4.)

The letter of the law is so clearly and unambiguously expressed that it and the spirit of the law should be deemed to be identical.

The postmaster's bond statute falls squarely within the rule that the letter of an unambiguous law is not to be disregarded on the pretext of pursuing its spirit.

Crooks vs. Harrelson, 282 U. S. 55, 75 L. Ed. 156.

It is not denied by the defendants or by the courts below that the *letter* of 39 *U. S. C. A.*, Sec. 34, prescribing the coverage of a postmaster's bond, includes duties owing by postmasters to mail-users. It is merely claimed that the coverage is limited to the Government's interests, because the bond runs to the United States and because there are collateral statutes and department regulations which, it is claimed, evince a purpose to protect the Government alone. The surety regards as unnatural any thought that the Government would be so altruistic as to protect the people for whose benefit, primarily, the postal service exists.

That, in exacting a bond from postmasters, the Government has *power* to exact one that is broad enough to protect its citizens—the protection of whom is the only purpose for which the Government exists—is undenied and undeniable.

When we couple to that power the idea that reasons why the Government *should* protect postal patrons are as strong as if not stronger than the reasons why it should protect

itself, in dealings with postmasters, then does it not necessarily follow that the statute requiring a bond should be scrutinized and interpreted with a view to finding in it legal intendment that the Government has exercised that power and discharged that duty? No consideration can warrant stretching the words of a statute to mean that the Government, trustee for the people, has sought to protect itself only, and to leave the people, the beneficiaries of the trust, without the same protection. If the words are to be stretched, it should be for the purpose of accomplishing the justice that can only be accomplished through protecting both the Government and postal patrons.

But it is not necessary to stretch the language of the statute in question. The statute requires that the bond be conditioned, and the bond is conditioned, for faithful performance of *all* of the postmaster's duties imposed on him by law *or* regulations. And, as the Circuit Court of Appeals itself observed in *Howard vs. United States*, 102 Fed. 77, it is only by an unwarranted reading into such a bond of words not there that the bond can be made to read that it is for the benefit of the Government alone.

From *Grady vs. United States* (C. C. A. 8), 98 Fed. 238, 240, an action on a postmaster's bond for embezzlement of money-order funds:

> "As the bond specially provides that the principal shall comply with all of the duties and trusts imposed on him either by law or the rules and regulations of the post-office department, the liability of the sureties is not only within the spirit, but the letter, of the bond."

The Circuit Court of Appeals cited the *Grady Case* in support of its conclusions in the *Howard Case*.

The Circuit Court of Appeals does not seem to give effect

to the surety's contention that an interpretation of the postmaster's bond statute is controlled by the mere fact that it provides for a bond running to the Government. Nor does the Court support the surety's argument that we should be denied relief because in some other case a bond might prove insufficient to cover claims of both the Government and private mail-users. Nor does the Court seem to deny that the letter of the statute covers both. The Court reached its conclusion by placing in one scale of a balance: (1) The letter of the statute, conferring benefits on both the Government and mail-users. (2) Postal regulations relating to safe conduct of the mail. (3) A conception that "the principal purpose of the postal system is to transmit private mail;" and by placing in the other scale a conception "that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond primarily for the Government's protection." The Court finds that this conception outweighs the three considerations in the first scale (R. 106; 103 Fed. (2d) 452).

In Subdivision VII (c) of this brief, we have attempted to answer this position, noting that the lower court overlooked many federal statutes that are plainly designed for the benefit of mail-users. We have, also, attempted to demonstrate a preponderating solicitude of Congress for the protection of the right of mail-users to faithful handling of their letters, etc. There remain to be considered a few points bearing on the spirit of the statute.

VII (a).

The Spirit of the Law Is Found in the Consideration That Congress Has Enacted What It Should Have Enacted for the Benefit of Mail-Users.

(See Assignment of Error No. 4.)

> "It is the duty of the United States to protect the public against its own officers, even to the extent of enforcing every legal right which it possesses, whether criminal or civil."
>
> *United States vs. Grisscold*, 8 Ariz. 453, 458.

The last quoted statement was made with specific application to the rights of users of the mail on postmasters' bonds.

In *Massachusetts Bonding & Ins. Co. vs. United States* (C. C. A. 7), 54 Fed. (2d) 1039, the Court distinguished between reasons supporting an action on a postmaster's bond by a user of the mails and the lack of reasons to support an action by a postmaster on his deputy's bond. This distinction was drawn in holding that the United States, as obligee of a deputy postmaster's bond, could not recover from the surety for the benefit of the postmaster who voluntarily made good the deputy's shortage. In referring to *United States Fidelity & Guaranty Co. vs. United States* (C. C. A. 9), 246 Fed. 433, and particularly to certain postal regulations mentioned in that case, the court said (pp. 1040-1041):

> "There is a basis, in fact, which probably accounts for the regulations and statute, above referred to, protecting the users of the mail, but this protection should not extend to a third party like a postmaster. One using the mail has no voice in the appointment of the post office force, and no control over the handling of the mail received by the department. The postmaster, on the other

hand, is not so handicapped. He can exact a bond from the deputy to protect himself. He may cause the deputy's removal, and he may personally prevent defaults or misuse of funds. *The user of the mails can do nothing but deliver his mail to the post office.*" (Italics supplied.)

"All these advantages the law provides for the security of the subject, in consideration of their being obliged to send their letters by this mode of conveyance."

Lord Mansfield, in *Whitfield vs. Despencer* (K. B.), 2 Cowper 754.

Concerning a county auditor's bond for faithful discharge of his duties it was said in *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 407-408:

"Under such language as we have in this bond, and under the description in the statutes of the duties that are required of an auditor of the state of Ohio, it seems to me that it is placing an entirely unjustifiable and strained construction upon the language used to confine the obligation to the protection of the people of the county and the taxpayers and the funds in hand in their dealings with the auditor. *The public at large, under any well-regulated and intelligent public policy, should be protected in their dealings with the county as much as the county itself in its corporate interest in the business that is done.*" (Italics supplied.)

VII (b).

The Spirit of the Bond Statute Is Found in the Purpose for Which the Postal Service Primarily Exists—the Convenience and Needs of the People in Their Private Affairs.

(See Assignment of Error No. 4.)

The history of our postal system does not justify the conclusion reached by the Circuit Court of Appeals, that Congress intended, primarily, to secure the Government in "its fiscal and other relations with the numerous postal employees over the country," when it exacted a bond for the faithful discharge of *all* of a postmaster's duties.

The provision in the Constitution, Art. I, Sec. 8: "Congress shall have power: * * * To establish post-offices and post roads," should not be dissociated from the Colonial conception of a system operated for the benefit of the people. Our postal system did not really originate with the Constitution; its beginning is found in the British postal service—not as a copy of the British system, but as a Colonial branch. Essentially, the same system was carried over through the Confederation and into the Union. So, the framers of the Constitution reasonably may be assumed to have contemplated continuation of a system designed primarily for the benefit of the people. The Union was formed to increase the rights of the people individually rather than to surrender those previously possessed by them. They were used to a system under which the responsibility of postmasters to them had long been recognized, and Congress should not be deemed to have ignored that responsibility when it required postmasters to furnish bonds for faithful performance of all of their official duties.

When the people themselves, through the Constitution, transferred to the Government as a monopoly the transmis-

sion of mail, they must have been actuated by a belief that this would enhance the integrity of the mails. It would be unreasonable to assume that the people contemplated the surrender of any advantage enjoyed by them under the old system of private carriage of mail. Had transmission of the mails remained a private enterprise, the sender of a mishandled letter would have had causes of action against the carrier and his employees under the law of bailments. The people may be deemed to have contemplated that the Government itself would not be liable for mishandling of mail, excepting as Congress might so provide. But they had a right to expect that Congress would at least provide some efficient and adequate means whereby users of the mails could secure private redress for private wrongs committed by postmasters under color of their public office.

Congress has not disappointed these natural expectations of the people. Congress itself, by express statutes that bind the Post Office Department from top to bottom, has taken measures to guard against interference with the flow of legitimate correspondence. These statutes prescribe that letters shall be either delivered to the addressees or returned to the sender. The statutes prescribe duties which Congress has deemed so fundamentally important that not even the Postmaster General is left with any power of discretion to relax requirement for their performance.

History of the Postal System.

The following brief history of the postal service will serve to show how the system has been developed contemporaneously on both sides of the Atlantic as an institution for the primary benefit of the people in their private capacities. Except as otherwise noted, the facts have been taken from

"*History of the British Post Office*," by J. C. Hemmeon (Harvard Economic Studies, 1912).

Originally the English post office was established to serve the royal household; other private letters were carried, if at all, without revenue (p. 12).

In 1633 the post was reorganized as a source of revenue, and the post offices were farmed out.

During the eighteenth century, postage rates greatly increased, and stricter economy was enforced in the post office, to serve the nation's need for a larger revenue (p. 49).

Commencing with 1840, the principle of using the post office as an instrument of taxation was abandoned in favor of the view that it was primarily established for the benefit of trade and commerce. In 1840 an act was passed establishing penny postage for the United Kingdom.

The first Colonial post office appears to have been established in 1639 for the Massachusetts Bay Colony for foreign mail only. In 1672 mail service was established from New York to Connecticut and Massachusetts Bay Colony appointed a postmaster.

In 1688, letter offices were ordered established in the North American colonies. In 1691, a patent was granted to one Neale to establish post offices there. The Colony of Massachusetts appointed one Hamilton Postmaster General. The division of authority was corrected by Neale appointing Hamilton his deputy. A regular weekly post was established between Boston and New York and New York to New Castle, Pa. Hamilton was in Boston and postmasters were appointed in New York and Philadelphia (pp. 32-33).

In 1737, Benjamin Franklin was appointed postmaster in Philadelphia. In 1753, he was appointed postmaster for the Colonies, and dismissed from office in 1774.

July 26, 1775, the Continental Congress appointed Franklin postmaster and established the postal system. Franklin held office until November 7, 1776, when he went to France.

Articles of Confederation, Art. IX, gave Congress the "sole and exclusive right and power of * * * establishing and regulating post offices from one state to another, throughout all the United States, and exacting such postage on the papers passing thro' the same *as may be requisite to defray the expenses of the said office.*" (Italics supplied.)

The original draft of the provision in Constitution, Art. 1, Sec. 8, empowering Congress to "establish post offices and post roads," omitted reference to post roads. "Post roads" was added by a vote of five to four. "*Formation of the Union*," p. 556. (Government Printing Office, 1927.)

The post office, under the Constitution, was established by an act adopted May 8, 1794. 1 *Stat. at L.*, p. 357.

A concise history of the development of the postal service in this country appears in *Hoover vs. McChesney* (C. C., Ky.), 81 Fed. 472, 477. There it is noted how the power given Congress over the postal service had "become an indispensable part of the social and commercial life of the nation." The court quoted 3 *Story, Const.*, Sec. 1120, on this point, and then showed how the postal service had been so developed as to foster *business interests*, as well as social and political contacts.

For a more detailed history of the postal service, traced from its beginning in the Colonial days as a branch of the British system, through the Confederation, and down to its establishment by our Government, after the British pattern, see *United States vs. Kochersperger* (C. C., E. D., Pa.), 29 Fed. Case No. 15,541.

Principal Purpose of System.

For a brief and interesting discussion of the development of the postal service as a governmental agency, see 1 *Chitty's Blackstone* (1842 Ed.), 239-247. It was there observed of the postal system, viewed as an institution to raise public revenue and also to serve the public:

> "There cannot be devised a more eligible method than this of raising money upon the subject; for therein *both the government and the people find mutual benefit.* The government acquires a large revenue; and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed." (Italics supplied.)

Here we find a recognition of a "partnership" between the Government and the people—a consideration in itself sufficient to show that a postmaster's bond faithfully to discharge *all* of his duties should be deemed to secure both members of the partnership.

But the interest of private mail-users in the faithful transmission of mail has become a preponderating factor since the last quoted commentary was written. As shown by the historical outline presented above, the postal service was abandoned as an instrument of taxation a century ago, and it is a matter of common knowledge, we believe, that the service exists now primarily as a safe and convenient means of communication between people in their private social and business affairs.

Except for its use by private persons, it is inconceivable that the Government would maintain a postal service. Undoubtedly, its official communications would be sent by privately owned carriers, just as the Government now utilizes privately owned companies for the transmission of telephonic

and telegraphic messages. It is specially inconceivable that post offices would exist in any of the thousands of villages and small towns—to which class belongs Montgomery, Minnesota (population, 1930 census: 1,570)—were it not for the needs and convenience of private mail-users.

In *Howard vs. United States*, 184 U. S. 676, this Court held that the bond of a Federal District Court clerk, for the faithful discharge of *all* of his duties, protected the relatively small number of people who within a lifetime have occasion to deal with such officials. Practically every person in the country who is able to read and write is a frequent user of the mails. Does not that consideration suggest a much stronger reason for according to mail-users security against the torts of postmasters, where a similarly worded bond is given?

> "Now, our whole economic, social and political system has become so dependent upon free and *secure postal communications*, that the attempt to measure its specific effects can be little less than a waste of words."
>
> *Encyclopedia Political Science*, Vol. III, p. 310, article on "Post Offices" by Pres. Arthur T. Hadley.

In *Public Clearing House vs. Coyne*, 194 U. S. 497, 506, this Court said:

> "The postal service is by no means an indispensable adjunct to a civil government, and for hundreds, if not for thousands, of years, the transmission of private letters was either intrusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times, and was recognized in the Constitution and in some of the earliest

acts of Congress, the rates of postage were so high, and the methods of transmission so slow and uncertain, that it was not until 1845, when the postage was reduced to 5 and 10 cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance it now possesses.

"It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defense of the government against insurrection and foreign invasion, and the administration of public justice are; but is a public function, assumed and established by Congress for the general welfare, and in most countries its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue to the government, and really operates as a popular and efficient method of taxation. Indeed, this seems to have been originally the purpose of Congress."

In re Jackson, 96 U. S. (6 Otto) 727, this Court said:

"The power vested in Congress 'To establish post offices and post roads' has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and *all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.* * * * The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. *The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations* as to what shall constitute mail matter, *but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.* * * * No law of Congress can place

in the hands of officials connected with the postal service any *authority to invade the secrecy of letters* and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." (Italics supplied.)

"The vigilance and care observed by the Government in the postal service is the inducement upon which people employ the mails. The security, both when the Government was under no legal liability, and now when it is under a limited legal liability, covers all known methods to prevent loss from negligence, accident, or dishonesty. The Government occupies the field of mail transportation to the exclusion of others, and invites the fullest possible use of its facilities, even in that portion of the field which other instrumentalities cover. The moral liability of the Government has always been an element in the situation, and has helped to strengthen the confidence with which people respond to the Government's invitation to use its facilities. Consequently, both when the Government was under no legal liability for loss, and now when its legal liability is restricted to $10 for each first-class [registered] piece, it has always investigated losses and sought to recover and restore to the owner the value lost, or as much thereof as possible. The Government limits its legal responsibility, but uses the utmost endeavor to find and restore a lost piece of mail, and if the loss is not caused by a casual disappearance or accident but is due to dishonesty and unfaithfulness, *compels restitution from the culprit and from those responsible for his faithful service.* I think there can be no doubt that this is and has been historically the Government's attitude, and that it is the necessary and right attitude." (Italics supplied.)

23 *Op. Atty. Gen.* (Hon. Philander C. Knox) 476, 478.

The Opinion of Attorney General Knox, just cited, was followed in *American Surety Co. vs. United States* (C. C. A. 5), 133 Fed. 1019.

The Government's monopoly of the postal service rests, essentially, upon consideration of the best interests of private users of the mails. Those considerations were thus recognized in *Blackham vs. Gresham* (C. C., S. D., N. Y.), 16 Fed. 609, 612:

> "If private agencies can be established, the income of the Government may be so reduced that economy might demand a discontinuance of the system; and thus *the business which it is the right and duty of the Government to conduct for the interest of all*, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for their profit to exclude localities or classes from the benefit of the service."

To the same effect, see *United States vs. Hall* (C. C., E. D., Pa.), 26 Fed. Cas. No. 15,281.

> "Congress, of course, has ample power to protect the mails of the United States, and any letter which gets into them, from the time it is received by the postal authorities *until its possession is surrendered voluntarily and rightfully to the party entitled to receive it.*"
>
> *United States vs. Bullington* (C. C., N. D., Ala.), 170 Fed. 121.

In *Hoover vs. McChesney* (C. C., Ky.), 81 Fed. 472, 479, 481, it was decided that the right to use the mails is not "a mere privilege or gratuity which can be given or refused by those in charge of the postal service," but is in the nature of a *property right*, of which one cannot be deprived without due process of law. The Court said (p. 480):

"It is not to be overlooked that the establishment of the postal service * * * has become a part of the business operations of the citizens of the United States, and an *indispensable part in some kinds of business;* and that this right to the use of the mails by *sending* and receiving mail is a most valuable one to the citizens, and one *the depriving of which would destroy the business and the living of very many of the citizens* of the United States."

Although the cited case was decided by an inferior federal tribunal, the decision and the supporting reasoning scarcely needs approval of a higher tribunal. A check of the Federal Citations fails to disclose any case in which any other court has questioned the soundness of the cited decision, so far as its applicability to the case at bar is concerned.

A clear and concise summary of reasons why postal officers should be held liable to private mail-users for breach of statutory duty toward them appears in the opinion of Chief Justice Macdonald of the British Columbia Court of Appeal in *Literary Recreations, Limited, vs. Saure* (B. C., 1932), 4 D. L. R. 553, 3 W. W. 123, 58 Can. C. C. 38. That was an action in tort against the Postmaster General and a subordinate for excluding matter plaintiff attempted to send through the mail. The action was dismissed only because the Postmaster General was found to have acted within a discretion vested in him by statute. Reasoning why postal officials should be held accountable to private mail-users, Chief Justice Macdonald said:

"The *Post Office Act* was enacted by the Dominion Parliament for the benefit of the public. It is true that it was not bound to pass a *Post Office Act*, but having done so those who use the post office, I think, have the

right to expect that it will be conducted in a way which will not unreasonably interfere with the rights of those who use it. The principle I think is the same as that which governs companies such as railway companies who while not bound to furnish all conveniences for their passengers yet if they do furnish one they are bound to use it in such a way as not to injure their passengers. The post office is in reality a public utility erected for the convenience of the public at their expense, thereby giving those who use it the right to demand immunity from torts such as the one which was alleged to have been committed here."

If post offices were operated as a municipal enterprise, it is not to be doubted that cities would be liable to mail users for such tort as was committed by the postmaster in this case. The same reasons that make cities subject to the liabilities and responsibilities in the operations of such public utilities as waterworks and electric plants, would make them liable for torts committed in the operation of a municipal post office.

"* * * A municipal corporation engaged in the business of supplying water to its inhabitants for its own corporate benefit or profit is performing a private or corporate function, although a profit is not in fact made, and is liable for negligence in the performance of such enterprise, in the same manner as a private corporation or individual would be."

43 *C. J.* 1177, Sec. 1948.

The same rule applies to electric or power plants (43 *C. J.* 1184, Sec. 1950) and gas plants (43 *C. J.* 1182, Sec. 1951).

VII (c).

A Postmaster's Principal Duties Run to Users of the Mails, Not to the Government.

(See Assignment of Error No. 4.)

The Circuit Court of Appeals says that the "related statutes and postal regulations" do not support an inference "that Congress intended to extend the protection of the bond to private mail-users" (R. 106; 103 Fed. (2d) 452). We respectfully submit that the lower court erred in reaching that conclusion—through overlooking important statutes and regulations designed by Congress for the special benefit of mail-users.

The Circuit Court of Appeals specifically refers to but two related statutes, 5 *U. S. C. A.*, Sec. 377, and 28 *U. S. C. A.*, Sec. 732.

Sec. 377 merely requires that the bond run to the United States of America. Under another heading in this brief—Subd. III (b)—we draw attention to the doctrine of *Howard vs. United States*, 184 U. S. 676, and numerous other cases, that the mere fact that the United States is required to be named as obligee of a bond does not exclude coverage of the bond for the benefit of private persons.

Sec. 732 deals only with *remedies*. At most, it merely requires that certain actions be brought "*in the name of the United States.*" The effect of this section is discussed hereinafter in connection with the plaintiff's right to sue in the name of the United States. (See Subd. IX (a).)

Judge Nordbye, the trial judge, in his opinion (R. 75-76), refers to:

39 *U. S. C. A.*, Sec. 35, providing for the approval of postmasters' bonds by the Post Office Department.

39 *U. S. C. A.*, Sec. 36, permitting payments made by a postmaster, after giving a new bond, to be applied to discharge of obligations arising under the old bond.

39 *U. S. C. A.*, Sec. 37, providing for notice to the surety when the postmaster is short in his accounts.

39 *U. S. C. A.*, Sec. 38, making a postmaster liable on his "bond for the safe-keeping of the public property of the post office, *and the due performance of the duties thereof*," until his commission expires, etc.; and providing for termination of the surety's liability on notice where there is prolonged delay in filling a vacancy. (Italics supplied.) (We assert that this section merely makes clear the intended duration of the bond required by Sec. 34.)

39 *U. S. C. A.*, Sec. 40, prescribing a three-year limitation on suits by the United States where the *settlement of a postmaster's account* shows that he is *indebted* to the Government.

39 *U. S. C. A.*, Sec. 44, prescribing penalties against the postmaster and his surety for neglect to render accounts.

The surety's brief in the Circuit Court of Appeals, in addition to citing some of the statutes above mentioned, cited:

5 *U. S. C. A.*, Sec. 22, authorizing the Departments to adopt regulations not inconsistent with law.

5 *U. S. C. A.*, Sec. 392, empowering the Postmaster General to settle claims against the *United States*, for *damage done to person or property* in the operation of the postal service, *where the award does not exceed $500*.

39 *U. S. C. A.*, Sec. 790, providing for delivery by the Postmaster General of stolen property, or its proceeds, to the owner *when the same comes into the hands of the Department*.

31 *U. S. C. A.*, Sec. 215, providing for settlement of claims *against the United States for not more than $1,000*, "on ac-

count of damages to or loss of privately owned property," caused by *negligence* of any Government officer or employee. (This statute is not limited to the postal service.)

5 *U. S. C. A.*, Sec. 306, requiring the Attorney General to appear *on behalf of the United States* in this Court and in the Court of Claims when the United States or an officer is a party or interested. (The Attorney General has specifically ruled that this is not an action in which he properly may appear—R. 58-59.)

5 *U. S. C. A.*, Sec. 317, giving the Attorney General superintendence over District Attorneys.

5 *U. S. C. A.*, Sec. 485, requiring District Attorneys to prosecute actions in which the United States are concerned.

We believe that the foregoing lists include every federal statute that has been cited in this case to support a view that Congress did not intend that private mail-users should have a right against a postmaster and his surety on a bond given for the faithful discharge of all of the duties imposed on him by law.

It will be noted that the lists are singularly lacking in references to *statutes that impose duties on postmasters.*

Below we summarize statutes which impose duties and responsibilities upon postmasters for the obvious benefit of mail-users:

39 *U. S. C. A.*, Sec. 4, requiring every postmaster to keep an office for "receiving, delivering, making up, and forwarding all mail matter received thereat."

39 *U. S. C. A.*, Sec. 7, requiring postmasters to post in a conspicuous place in the office a schedule of mail arrivals and departures.

39 *U. S. C. A.*, Sec. 401, providing for advertising undelivered letters.

39 *U. S. C. A.*, Secs. 406-410, requiring undeliverable let-

ters to be returned to the sender or sent to dead letter office for identification of the sender.

39 *U. S. C. A.*, Sec. 409. "When the writer of any letter on which the postage is prepaid shall indorse on the outside thereof his name and address, such letter shall not be advertised, but, after remaining uncalled for at the office to which it is directed the time the writer may direct or the Postmaster General prescribe, *shall* be returned to the writer without additional charge for postage, and if not then delivered, shall be treated as a dead letter." (Italics supplied.)

18 *U. S. C. A.*, Sec. 315, making it a felony to embezzle a letter or to divert it from the addressee with design to obstruct correspondence.

18 *U. S. C. A.*, Sec. 318, making it a felony for a postmaster unlawfully to detain, delay, embezzle or destroy a letter.

18 *U. S. C. A.*, Sec. 324, making it an offense knowingly to obstruct or retard the mail.

39 *U. S. C. A.*, Sec. 256, forbidding the opening of nonmailable letters by any person other than an employee of the dead-letter office.

For pertinent regulations of the Department, designed for the protection of mail-users, see the list compiled under the head, "Departmental Regulations Involved," in our Statement of the Case.

When Congress enacted 39 *U. S. C. A.*, Sec. 34, requiring a postmaster to give bond for the "faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department," Congress could not have foreseen just what duties might be imposed by departmental regulations. But Congress must have had in mind that it was requiring a bond for the faithful performance of the specific duties enjoined by itself upon postmasters. And Congress must have had in mind the faithful performance

of duties arising under regulations designed to effectuate the intention of Congress that there be no unwarranted interference with private correspondence.

That the principal duties of a postmaster center about the handling of mail is shown by 39 *U. S. C. A.*, Sec. 4, which provides that "every postmaster shall keep an office * * * for the purpose of receiving, *delivering*, making up, and forwarding all mail matter received thereat." (Italics supplied.)

Congressional intention that the postal service shall be operated primarily for the benefit of private mail-users is further attested by 39 *U. S. C. A.*, Sec. 158, which provides: "The Postmaster General, *when the public convenience requires it*, may establish within any post-office delivery one or more branch offices for the receipt and delivery of mail matter and the sale of stamps and envelopes." (Italics supplied.)

In a case reported by Sir Wm. Blackstone—*Rowning vs. Goodchild*, 2 W. Bl. 906, 3 Wils. 443, 5 Burr. 2716—the Court referred to an English statute resembling Sec. 4, *supra*, in support of its decision that a postmaster was liable for failing to deliver letters to an addressee at the addressee's place of abode. Emphasizing the importance of *delivery*, the famous reporter italicized that word in noting that the English postal act imposed upon postmasters the duty of "receiving, dispatching, sending, and *delivering* all letters and packets whatsoever." The Court referred to several other statutes, resembling those above summarized, designed to insure prompt delivery or return of letters. Referring to deputy postmasters, who discharged the same duties as our postmasters, the Court said:

> "* * * We think that, in all cases, deputies are answerable for their own personal misfeasance, such as detaining the letters in question; and in the present case

the deputies are made by the act of Parliament, *ex necessitate rei*, substantive officers, and their duty pointed out as such. And it is fitter for the subject to resort to them for satisfaction for injuries done by themselves, than to their principals"—the Postmaster General.

In *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, 249, the Court said:

"It is the duty of the Post Office Department to deliver mail in so far as it is possible to the individual, firm, or corporation for whom it is intended."

Not even the Postmaster General could have legalized the postmaster's misdelivery of plaintiff's mail. In *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94, 109, this Court said concerning the Postmaster General's powers:

"His right to exclude letters, *or to refuse to permit their delivery to persons addressed*, must depend upon *some law of Congress*, and if no such law exists, then *he cannot* exclude or *refuse to deliver* them." (Italics supplied.)

Because the right of a mail-user to have his matter *delivered* to the addressees is more important than the right to have it *carried* through the mails, what was said in *Payne vs. Railway Pub. Co.*, 20 App. D. C. 581, 598, is in point:

"The citizen who desires to have his publication carried in the mails * * * and who has fully and fairly complied with all the requirements of the statute in regard thereto, has acquired *a positive legal right to have it so carried*, and his right will be enforced by mandamus," etc.

No aura of immunity from liability for wrongful conduct

surrounds a postal officer or employee. When a mail-coach driver was indicted at Old Bailey for manslaughter, by running over the decedent, it was urged in his defense that his contract with the Post Office compelled him to drive at a speed of nine miles per hour. Lord Ellenborough instructed the jury that neither the defendant's public contract nor considerations of public convenience justified endangering the lives of His Majesty's subjects. The defendant was convicted.

The Rose, 2 Wm. Rob. 1, 166 E. R. 656.

When a postmaster receives for the Government a stated sum for the transmission of a business letter, and then receives the letter, there is a legitimate assumption that the letter is of more importance to the sender or the addressee than the amount of postage paid; otherwise, presumably, the letter would not be sent. So, in every such transaction the mail-user has an interest that is at least equal if not paramount to that of the Government. The Government is concerned in receiving the pennies that have been collected by the postmaster as postage, and the sender of the letter is interested in having the letter either delivered to the addressee or returned to him. Why should not the mail-user be protected as well as the Government, against the postmaster's failure to discharge his duty? The Government can exercise caution to choose as postmasters those who may be depended upon properly to discharge their duties. "The user of the mails can do nothing but deliver his mail to the post office." *Massachusetts Bonding & Ins. Co. vs. United States* (C. C. A. 7), 54 Fed. (2d) 1039.)

The complaint averred a loss of $34,997.03, resulting from the postmaster's breach of duty (R. 18). The jury returned a verdict for the full penalty of the bond; $16,000 (R. 63).

Thus it appears that the plaintiff's actual loss is as great as the loss would have been to the Government if the postmaster had embezzled the receipts from the sales of more than 1,150,000 three-cent stamps.

So important did the New York Court of Appeals regard the protection of business letters against falling into unauthorized hands that it directed the appointment of a referee to receive letters addressed to a physician and to distribute them between the physician and a company to which he had sold his business.

Dr. David Kennedy Corp. vs. Kennedy, 165 N. Y. 353.

Modifying a judgment that directed that all mail addressed to the physician be delivered to the company, the Court of Appeals said:

> "In some cases this would work injustice to the defendant by allowing strangers to read letters of a confidential character that were intended only for him. At the same time it would be unjust to the plaintiff to allow the defendant to open and read letters intended only for it, and to discover the secrets of its business."

Judicial notice will serve to remind the Court of an almost endless list of situations in which delivery of letters to the addressees, or return of the same to the senders, is of vital importance to mail-users. Here are some examples:

Where a statute provides for substituted service of process by mail, or for the service by mail of notices or other papers in actions, etc.

Where creditors and other interested persons are notified of hearings, or of a time limit for filing claims, in proceedings involving the liquidation of the estates of decedents and insolvent persons.

Where owners are notified of hearings concerning the taxation, assessment or condemnation of property.

Where an advantageous offer to enter into a contract of employment or for the sale or purchase of goods or other property is dispatched.

Where a letter contains documentary evidence that a debtor has paid what he owes, or contains any other evidence bearing on a legal right.

Where, as in the case at bar, the sender of letters seeks information concerning the financial responsibility of persons to whom he is asked to extend credit.

We leave out of consideration the vast volume of social correspondence, where the faithful delivery of letters is of the greatest importance to the people—for example, letters concerning serious illness or death of persons—but involving situations in which it might not be possible or practicable to assess damages.

In *Hurley vs. Olcott*, 198 N. Y. 132, it was held that failure of an employer to receive a statutory notice of injury to an employee, mailed to the employer, did not vitiate the notice. The Court said:

> "In many cases the statute provides that notice may be served by mail. Such is the provision as to service of papers on the attorneys in an action, and it has been uniformly held that the service was effective when the papers were properly mailed, *regardless of their receipt by the adverse party. The risk of miscarriage is with the party to whom they are directed.*" (Italics supplied.)

From 46 *Corpus Juris* 599, Sec. 69:

> "However, by force of statute or by provision of contract, service may be effective when the notice is properly mailed, regardless of its receipt by the addressee."

One of the many reasons for holding a postmaster strictly responsible for faithful performance of his duties in handling letters, is the established rule of evidence, that proof of the mailing of a letter raises a presumption of its receipt by the addressee, especially where the envelope bears the return card of the sender. As shown in *Myers vs. Bibee Grocery Co.*, 148 Va. 282, the rule rests upon a presumption that the letter has been handled by the postal service in the course required by law.

From 1 *Wigmore on Evidence* (2d Ed.), Sec. 95:

> "The fixed methods and systematic operation of the Government's postal service have been long conceded to be evidence of the due delivery to the addressee of mail matter placed for that purpose in the custody of the authorities."

See, also, 1 *Jones on Evidence* (4th Ed.), pp. 88-90, Sec. 52; and pp. 213-214, Sec. 123, note 18.

This Court said in *Rosenthal vs. Walker*, 111 U. S. 185, that, on proof of mailing a letter, "it is presumed, from the known course of business of the postoffice department, that it reached its destination at the regular time and was received by the person to whom it was addressed."

Where it was shown that a letter bore the sender's return card, it was said in *Hedden vs. Roberts*, 134 Mass. 38, 39:

> "It was the duty of the officers of the postal service to return the letter to the address upon the envelope (the postage being prepaid) if it was not delivered to the person to whom it was addressed, and there is the same inference of fact that they would do their duty in this respect as in forwarding and delivering letters addressed to a merchant at his place of business. U. S. Rev. Sts. Sec. 3939."

In *Jensen vs. McCorkell*, 154 Pa. 323, the Court said con-

cerning the weight of the presumption of receipt of a letter, as affected by proof that the letter bore a return card:

"So greatly, indeed, does that fact strengthen the presumption, that it becomes well-nigh conclusive."

In re Imperial Land Co., L. R. 15 Eq. 18, 42 L. J. Ch. (N. S.) 372, the Court found, as a matter of fact, from mere evidence of the mailing of a letter, that the letter had been received in due course, although the addressee denied receipt.

VIII.

The Decision of the Circuit Court of Appeals Conflicts With a Settled Rule That the Government, as a Bailee, Can Recover on Similar Bonds for Theft of Registered Letters and the Like, Irrespective of the Government's Liability to the Mail-User.

(See Assignment of Error No. 9.)

Concerning its conclusions that Congress did not intend to confer a direct benefit on mail-users, and that the dominant purpose was to protect the United States, the Circuit Court of Appeals says:

"These conclusions are not inconsistent with those decisions in which the Government in actions brought in the name of the United States upon similar bonds has recovered for the theft of registered letters and the like, *even in the absence of the assertion of a claim by the sender or proof of loss to the Government other than the interference with its special property rights as a bailee.* In such cases the injury to its property right and the moral, and perhaps legal, obligation to refund the amount of the recovery to the mail-user are said to sustain a suit on the bond for the value of the lost property *irrespective of the fact that the Government may not be*

liable to the mail-user for that amount. National Surety Co. vs. United States, 8 Cir., 129 F. 70; *United States vs. American Surety Co.*, C. C. Ill., 155 F. 941; *United States vs. American Surety Co.*, 4 Cir., 163 F. 228; *Gibson vs. United States*, 1st Cir., 208 F. 534; *United States Fidelity & Guar. Co. vs. United States*, 9 Cir., 246 F. 433. Whether these authorities would sustain an action by the Government in this instance need not be determined. The indirect benefit to the plaintiff, if the Government may maintain such an action in its interest, does not justify the present suit. *United States vs. United States Lines Co.*, D. C. N. Y., 24 F. Supp. 427" (R. 106-107; 103 Fed. (2d) 452-453). (Italics supplied.)

First, we respectfully submit that the Circuit Court of Appeals here confuses remedial and substantive rights. (See our argument under Point I.) How can the Government hold a postmaster's surety liable for a loss not involving liability on its part to an owner of mail, unless the bond be read as being intended for the protection of mail-users? And if the loss is covered by the bond why cannot the injured person sue in the name of the United States, and thereby avoid the circuitous process of the Government suing and turning the recovery over to the owner, in the absence of a statute requiring the Government to sue? (See *Howard vs. United States*, 184 U. S. 676.)

And, if a bond for the faithful performance of *all* of a postmaster's duties covers duties to the Government in its capacity as *bailee* of mail, as to which it has no liability, or only a limited liability, to the sender, why does if not cover the postmaster's liability to the bailor—the sender?

So, if it be conceded that the Government as a bailee can recover on a postmaster's bond for the benefit of the bailor—the sender of a letter—without being liable to him, why

should the bailor be prevented from suing directly, in the name of the United States?

In *New Jersey Steam Navigation Co. vs. Boston Merchants Bank*, 6 How. 344, this Court said:

> "The cases are numerous in which the general owner has sustained an action of tort against the wrongdoer for injuries to the property while in the hands of the bailee. The above cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The court look to the substantial parties in interest, with a view to avoid circuity of action; saving, at the same time, to the defendant all the rights belonging to him if the suit had been brought in the name of the agent."

> "The existence of the bailee's right to sue does not preclude maintenance of an action by the bailor."
>
> 8 *C. J. S.* 371, Sec. 56, Note 81.

Regardless of express statutory provision, the law accords to patrons of ordinary common carriers and bailees a right to recover for wrongs against the bailed property, committed by a third person. If the third person happens to be an officer or employee of the carrier or the bailee, the carrier or bailee may be held liable under the doctrine of *respondeat superior*. But the Government, as bailee or carrier of private mail, cannot be held liable under that doctrine. Except as it provides some species of special protection for users of the mail, postal patrons are left with no other redress than a claim against the guilty postmaster, or other official or employee.

The Government expresses its unwillingness to rely upon the personal financial responsibility of a postmaster to

respond to it for such losses as he may cause the Government through violation of his duties as prescribed by law and departmental regulations; it requires of him a bond to respond for such losses. This is so, even though the Government has unlimited power and discretion in selecting postmasters and might limit appointments to persons of high solvency. But, as noted in *Massachusetts Bonding & Ins. Co. vs. United States* (C. C. A. 7), 54 Fed. (2d) 1039, 1041: "The user of the mails can do nothing but deliver his mail to the post office."

That the United States can recover on a postmaster's bond the full loss sustained by the sender of a mishandled letter is the holding of the Arizona Supreme Court in *United States vs. Griswold*, 8 Ariz. 153, 76 Pac. 596. The fact that there a registered package was involved cannot defeat application of the following quoted reasoning of that Court to letters in general, so far as concerns application of the law of bailments:

> "The government, in accepting a registered package, becomes not only the bailee of the sender, but assumes a liability to its bailor by reason of the bailment. Even should we therefore construe the liability of the sureties in its strictest sense, the government, as a bailee, would have a right to recover to the extent of its special interest, which would be measured by the extent of its liability to the sender of the package. If the government, therefore, has a right to sue to recover the loss it sustains as a bailee, under the general doctrine above stated, its recovery cannot be confined to such special interest, but may cover the entire loss sustained both by it and its bailor. Not only so, but we think it is the duty of the United States to protect the public against its own officers, even to the extent of enforcing every legal right which it possesses, whether criminal or civil."

Proceeding upon an assumption that only the United States could sue on the bond, the Arizona court concluded that it was "the clear duty of the government to bring such action."

In *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, the Court recognized that, in undertaking to carry letters, in consideration for postal charges paid, the Government becomes a bailee of the letters for the senders, and, as such, entitled to sue a wrongdoer for disturbing the Government's possession as such bailee. (It is to be noted that the Court did not limit this holding to valuables that may be enclosed in letters, but repeatedly referred (pp. 73-74) to the bailment as including "the *letters and* their *contents.*")

If the Government, as bailee of letters, is covered by a carrier or postmaster's bond for discharge of his duties under rules and regulations intended to safeguard against tampering with the mail, how can the spirit of the bond be held to exclude responsibility to the bailor, the sender?

The tortious conduct of the postmaster in this case, in delivering letters to an unauthorized person, was fraught with much heavier loss for the sender of those letters than was the rifling of letters in the case last cited. Obviously, no sound distinction can be made under which it can be held that if a postmaster causes a sender a $1.00 loss by rifling a letter of its contents his surety is liable, but that the surety is not liable if the postmaster tortiously diverts letters into the hands of a third person, thereby directly causing loss that may run into hundreds or thousands of dollars.

The decision in the last cited case was followed in *United States Fidelity & Guaranty Co. vs. United States* (C. C. A. 8), 229 Fed. 397, and, also, in *Gibson vs. United States* (C. C. A. 1), 208 Fed. 534, 537, *an action on a postmaster's bond.*

Decisions in cases where the Government has recovered on

bonds for misbandling of registered letters do not militate against our position, merely because the Government had obligated itself to indemnify the senders against losses, within certain limitations as to amount.

Where the Government sues on the bond of a postal clerk for breach of his duties by stealing letters, the fact that the Government is under no legal obligation to reimburse the sender does not defeat the suit. "The moral obligation to pay over to the bailors"—the senders—"would be sufficient to enable the bailee"—the Government—"to maintain the action."

United States vs. American Surety Co. (C. C., Md.), 161 Fed. 149.

In the last cited case, the surety unsuccessfully argued that because the letters stolen were not registered, the Government was under no obligation to the sender and therefore not entitled to recover on his behalf.

In reaching its conclusion, the Court followed *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, *supra*.

It is to be noted that an intimation of *legal* liability on the part of the Government to users of the mail, enforceable in the Court of Claims, where the Government recovers on a bond, was given in *Gibson vs. United States* (C. C. A. 1), 208 Fed. 534, 538.

In *United States vs. American Surety Co.* (C. C. A. 4), 163 Fed. 228, the Court held that where a postal clerk rifled letters he violated his bond, conditioned for faithful discharge of his duties, and that the Government could recover on the bond for losses of senders, although not liable to the senders. The Court said:

"With information in the possession of the prosecuting officers of the United States of this character con-

cerning the conduct of Hammel"—the clerk—it was their *duty* to bring a suit upon the bond, and, when such state of facts was shown to exist, we think *the law clearly contemplates that a breach should be declared which would entitle the United States to recover the amount of the bond*," etc. (Italics supplied.)

That there is a strong analogy between a case like the one at bar and authorities above cited is shown by the position adopted by the Circuit Court of Appeals in *Howard vs. United States* (C. C. A. 8), 102 Fed. 77, in holding that a Federal Court clerk's bond covers private litigants, and that a private litigant could sue in the name of the Government. In reaching that conclusion the Court said that it "fully concurred" in the views of trial judge, Judge Adams. And among those views the Court quoted the following:

> "When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even though perhaps the Government may not be subjected to a suit for its recovery, it clearly owes a high moral and meritorious obligation to the loser in the nature of a responsibility for the act of misconduct of its agent, and one which the national Congress might regard as sufficient to move it to a private act for his relief." (*United States vs. Howard* (C. C., W. D., Mo.), 93 Fed. 719, 721.)

In *United States vs. United States Fidelity & Guaranty Co.* (8 C. A. 6), 247 Fed. 16, it was held that the amount that the Government had paid the owner of a registered package that had been pilfered by a postal employee did not limit the amount that the Government could recover on the employee's bond. The Court said that the Government would hold the excess recovery, "upon a trust for the benefit of its injured patron. This right of recovery is rested, *not only on the legal right of an ordinary*

bailee for hire to recover the full value of the subject of the bailment from one who has wrongfully converted it, but upon *the right of the United States, as parens patriae, and upon principles of public policy, in the performance of its moral duty to protect the patrons of its post office establishment against theft by its unfaithful employees.*" (247 Fed. 18.) (Italics supplied.)

It will be noted that the last cited case and resembling cases above cited all deal with the liability of *sureties* on bonds of the character here involved, and do not limit the remedy to an action by the Government in tort against the principal whose misconduct has caused the loss.

> "The responsibility of the United States, in good faith and good morals, does not control the legal liability of the surety company. That must be determined by a proper construction of the language of the contract, in the light of all the circumstances."
>
> 23 *Op. Atty. Gen.* (Hgn. Philander C. Knox) 476, 478.

A theory that a trusteeship relationship exists between the Government and patrons of its official agencies was distinctly recognized by this Court in *Howard vs. United States*, 184 U. S. 692. In connection with the holding that Congress had shown, by legal intendment, that private suitors, as well as the Government, were beneficiaries of a Federal Court clerk's bond, and therefore entitled to sue thereon, the Court said:

> "The United States, or rather the court which had custody of the bond, is to be regarded as a trustee for any party injured by a breach of its conditions."

As already noted, the Circuit Court of Appeals and other federal courts have applied the same theory of trusteeship.

in favor of senders of registered mail. And because trusteeship in the latter class of cases has been recognized without regard to the Government's liability to senders of such mail, does it not follow that there is a trusteeship in cases like that at bar, where there has been a mishandling of unregistered mail, in violation of duties imposed by the postal statutes and regulations?

If the Government be treated as a bailee of mail entrusted to it for transmission, with the right accorded bailees in general to sue a third person who wrongfully deals with the subject of bailment, or his surety, then must it not follow that the sender of a letter is the bailor, and therefore entitled to the same remedies against third parties as bailors in general?

"Assumpsit will lie at the suit of a bailor against a third party to enforce a contract entered into by such third party with the bailee in relation to the subject matter of the bailment."

8 *C. J. S.* 372, Sec. 56.

6 *C. J.* 1166, Sec. 173.

New Jersey Steam Nav. Co. vs. Boston Merchants Bank, 6 How. 344.

Taintor vs. Prendergast (N. Y.), 3 Hill 72, 38 Am. Dec. 618.

Beebee vs. Robert. (N. Y.), 12 Wend. 413, 27 Am. Dec. 132.

IX.

Plaintiff's Right to Sue in the Name of the United States Flows From Congressional Will or Intent That Mail-Users Shall Be Beneficiaries of the Bond, and From Omission by Congress to Prescribe Another and Exclusive Remedy.

(See Assignment of Error No. 5.)

As we read the opinion of the Circuit Court of Appeals, the Court's denial of our right to maintain this suit really rests upon the sole consideration that mail-users are not co-beneficiaries with the Government of a postmaster's bond.

The Circuit Court of Appeals refers to this Court's holding in *Howard vs. United States*, 184 U. S. 676, first, that a federal court clerk's bond is for the protection of both the Government and private suitors, and, second, that consent to sue in the name of the obligee, the United States, might be assumed to arise by legal intendment. The Court then presents its conception why a postmaster's bond should be deemed to *protect* the Government only. And the Court concludes:

> "The plaintiff's argument and authorities fall far short of establishing the proposition that the bond in suit was required for the *direct benefit* of private mail-users, *or* that a *legal intendment permitting them to sue* on the bond should be read into the statute" (R. 105-106; 103 Fed. (2d) 452). (Italics supplied.)

Assuming that the bond was required to protect mail-users as well as the Government, we find no reasoning in the opinion of the Circuit Court of Appeals that is inconsistent with our right to maintain this suit. In short, the Court appears to have decided the case against us on the ground that mail-users have no substantive rights under a

postmaster's bond. If that conclusion be sound, it follows, of course, that there could be no legal intendment permitting a mail-user—or even the Government—to sue for his loss. But, once it be determined that mail-users are co-beneficiaries with the Government under a postmaster's bond, our right to sue automatically follows, under the doctrine of *Howard vs. United States*, 184 U. S. 676, *unless there is some act of Congress that provides another and exclusive remedy.* So, it is our position that the decisive question on the remedial issue is: Has Congress prescribed a special and exclusive remedy applicable to cases of this kind?

In *Federal Surety Co. vs. Minneapolis Steel & Machinery Co.* (C. C. A. 8), 17 Fed. (2d) 242, the court below said (p. 244):

> "The right of the third person to maintain an action on the contract in his own name is in a sense remedial, but *the right to sue depends upon the substantive right of such third party under the contract.*" (Italics supplied.)

A view that this action cannot be maintained in its present form runs counter to the ruling of the Attorney General:

> *"This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as stated by you, the claim is the exclusive property of your client and can be asserted only by your client"* (R. 58-59).

Thus are we placed between the surety's contention that only the Government can sue on our behalf and the Government's assertion that we should sue on our own behalf.

In determining the form in which plaintiff should sue, we started from the base recognized by this Court in *How-*

ard vs. United States, 184 U. S. 676. Finding no statute or subsequent decision of this Court to prevent applying the *Howard Case* as a governing precedent, we brought the suit in the form there upheld.

When the *Howard Case* was before the Circuit Court of Appeals (*Howard vs. United States*, 102 Fed. 77), that Court said (p. 84):

> "The contention that the relator has no right to maintain this action in the name of the United States upon his relation is without merit. Under the reformed procedure, which prescribes that the real party in interest must be plaintiff, it has been held that a suit on a bond given for the security of the public generally, and in which the state or other public corporation is the obligee, may be brought in the name of the person beneficially interested in the particular suit. * * *
>
> "On this question we fully concur in the views of Judge Adams, who tried the case at the circuit. He said:
>
> "'It is held in the case of *Corporation of Washington vs. Young*, 10 Wheat. 406, 6 L. Ed. 352, that no person can be authorized to use the name of another without his assent, given in fact *or by legal intendment*. It is my opinion that in imposing upon clerks of the circuit court the duties above alluded to, which so necessarily and vitally affect the interest of suitors in its courts, and *in requiring from such clerk a bond for the faithful discharge of such duties, the United States, by necessary legal intendment, thereby consents to the use of its name by suitors wronged by official misconduct* of the clerk in a suit against the clerk or his sureties on his official bond. This implied authority or necessary legal intendment becomes the more apparent when it is considered that the clerk's office is an agency of the United States government, ordained and established for the use and convenience of its people. The money intrusted to

its clerk is, in a large sense, money which the government has undertaken to keep for its people. When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even though perhaps the government may not be subjected to a suit for its recovery, it clearly owes a high moral and meritorious obligation to the loser in the nature of a responsibility for the act of misconduct of its agent, and one which the national congress might regard as sufficient to move it to a private act for his relief." 93 Fed. 719.

"Moreover, if there was technical error in stating the name of the plaintiff, this court would not reverse the case for that reason, but would direct the substitution of the name of the proper plaintiff. *McDonald vs. Nebraska* (at present term), 101 Fed. 171, and cases cited." (Italics supplied.)

(In passing, we draw attention to the fact that the language last above italicized has a bearing upon our argument under Subd. IV, *supra*. It will be noted that the Court treats the phrase, "suitors *wronged by official misconduct*," as the equivalent of a *failure faithfully to discharge official duties*. We cite this in support of our position that, when Congress spoke in the latter part of the postmaster's bond statute (39 *U. S. C. A.*, Sec. 34) of a postmaster's liability for "*misconduct in office*," it manifested intent that the postmaster's secured liability for the *faithful discharge of all his duties* should be co-extensive with his tort liability.)

In affirming the decision of the Circuit Court of Appeals, this Court said:

"A further contention is that, even if the bond was for the protection of individual litigants, it could not be put in suit by a private person, unless with the consent of the United States expressed in an act of Congress. * * *

"That case"—*Washington vs. Young*, 10 Wheat. 4
409—"undoubtedly is authority for the proposition th
generally speaking, an obligation taken under legisl
tive sanction cannot, in the absence of a statute so pr
viding, be put in suit in the name of the obligee, t
proprietor of the obligation, without his consent. B
it also sustains the proposition that *consent* may, und
some circumstances, be assumed to have been given
that is, *may arise by legal intendment.* * * * In so
opinion, Congress intended that the required bon
should protect private suitors as well as the Unite
States, and *therefore, no statute forbidding it, a privat
suitor may bring an action thereon for his benefit in th
name of the obligee, the United States.*" (Italics sup
plied.)

Howard vs. United States, 184 U. S. 676, 691-69

In *Johnson vs. United States* (C. C. A. 1), 163 Fed. 3
32, Mr. Justice Holmes, then on circuit, said:

"The Legislature has the power to decide what th
policy of the law shall be, and if it has intimated it
will, however indirectly, that will should be recognize
and obeyed."

Howard vs. United States, 184 U. S. 676, was followed i
State vs. Dahl, 150 Wis. 479, 135 N. W. 474, a suit on a stat
treasurer's bond to recover for nondelivery to the receive
of a loan and trust company of securities that had been de
posited in the treasury. The receiver sued in the name o
the State, on his own relation. Passing upon the merit
of a demurrer to the complaint, the Court said:

"The first proposition urged in support of the de
murrer is that the action is not brought by the proper
parties, but must be brought by the state itself, repre
sented by the Attorney General. This objection must
be overruled. The promise is made in form to the state

but, so far as this fund is concerned, it is entirely for the beneficial interest of third persons, and those *third persons must (if they are to receive the full benefit of the promise) have some way of enforcing its provisions, not dependent upon the will of others who have no beneficial interest in the promise.* Such bonds running to the state or some public official as obligee, but securing the performance of duties owing only to individuals or classes of individuals, are quite frequent; and the general principle is that, in the absence of express statutory provision, it will be held that the statutory intent is to grant permission to the individual or class protected by the bond to use the name of the state, or official, as plaintiff in an action brought to recover for breach of such a duty. *Howard vs. U. S.*, 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754. Unquestionably the Attorney General could bring the action without relator, and use the name of the state as plaintiff, because the state is, for this purpose, the trustee of an express trust (*State vs. Wettstein*, 64 Wis. 234, 25 N. W. 30); *but where, as here, the Attorney General has refused, as he doubtless properly may, to bring the action, because the state has no beneficial interest in it, there seems no good reason which should prevent the bringing of the action in the name of the obligee on the relation of the parties beneficially interested.*" (Italics supplied.)

From *State of Maryland vs. Baldwin*, 112 U. S. 490:

"By the law of Maryland the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond."

As early as 1844, this Court recognized, in *McNutt vs. Bland*, 2 How. 9, that where a private person has a right to

recover on an official's bond, the precise form in which he sues is immaterial. There suit was brought on a sheriff's bond in the name of the governor for the persons aggrieved by breach of the bond, which was conditioned for faithful performance of official duties. After noting that the suit could have been brought by the claimants in their own names, this Court added:

> "We can perceive no sound reason for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond, by and in the name of the governor, who is a purely naked trustee for any party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity. • • •"

In *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94, 108, where this Court recognized the right of an addressee of mail to enjoin a wrongful detention of the same by defendant postmaster, it was said:

> "That the conduct of a postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action of the head, or any one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. *The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.*" (Italics supplied.)

Finding that no statute sanctioned the detention of plaintiff's mail, this Court decided:

> "* * * The courts, therefore, must have power in a proper proceeding to grant relief. *Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld.*" (Italics supplied.)

In *United States, to use of Kinney, vs. Bell* (C. C. A. 3), 135 Fed. 336, an action on a federal circuit court clerk's bond, the Court approved the form in which the suit was brought, as to plaintiff, saying:

> "Although the United States is here the nominal plaintiff, the action was really brought and has been prosecuted by the use plaintiff, Kinney, to recover for an alleged injury sustained by him by reason of the clerk's refusal to issue a summons and file the papers aforementioned."

In *Literary Recreations, Limited, vs. Sauve* (B. C., 1932), 4 D. L. R. 553, 3 W. W. 123, 58 Can. C. C. 385, an action against a Postmaster General and his subordinate for excluding plaintiff's matter from the mails, plaintiff's right to sue was challenged on the ground that while the post office affords public facilities, the privilege is a revocable concession from the Government; that respondents were responsible only to the Crown; that the Attorney General should have been made a party; that the matter involved the performance of an act of State, thereby making a petition of right the only available remedy, if any remedy existed at

all. To these contentions Mr. Justice M. A. Macdonald replied:

> "If the right to use a commercial agency maintained by the public for many years is denied to a citizen a legal right is invaded."
>
> It was a fallacy to treat respondents as if they were the Crown or acting under the authority of the Crown. "Respondents act under the authority of a statute."
>
> "Unless the act complained of, viz., prohibition of the use of the mails, can be justified by the statute respondents are liable in damages as two individuals who stepped outside the ambit of their official duties to commit a tort, one for ordering the commission of the act, the other for implementing it. The interests of the Crown are not affected; nor the public revenues placed in jeopardy and it is not necessary that the Attorney General should be a party. We are not concerned with a high officer of state from or through whom appellant seeks to recover moneys under public control. It follows that the procedure is not by petition of right."

That the right of the United States to sue on an official bond for the benefit of private parties who have sustained a loss is not to be deemed to exclude the right of a private party to sue in his own name or in the name of the United States for his own use is established both by reasoning and authority.

United States vs. Abeel (C. C. A. 5), 174 Fed. 12, is on all fours with *Howard vs. United States*, 184 U. S. 676, which it followed, in the respect that another federal court clerk's bond was held liable for money that he misappropriated and that belonged to private parties. The two cases differed only in the fact that in the *Abeel Case* the United States itself sued on the bond, whereas in the *Howard Case* the action was brought by the aggrieved private party on

the relation of the United States. Reversing judgment ordered in favor of the sureties, the Circuit Court of Appeals said (pp. 17-19):

> "It is not denied that if the fund so received" by the clerk and misappropriated by him "had been the property of the United States, due to the government primarily and not to others, this action could be maintained; *nor is it denied that any one of the officers or witnesses who earned and to whom was due a part of such sum could maintain an action on the bond in the name of the United States for his use for the sum so due him.* * * *
>
> "*Unquestionably one entitled to a part of the fund in the hands of the clerk could sustain a suit on the clerk's bond in the name of the United States. Howard vs. United States, supra.* But it by no means follows that on the facts stated in the petition a suit cannot be maintained by the United States without a statement that the suit is for the use of someone named in the petition." (Italics supplied.)

Another case in which right to sue in the name of the United States was held to be an alternative remedy to a suit by the Government itself is *Bosler vs. United States* (C. C. A. 8), 26 Fed. (2d) 4. There the action was on the bond of a depository in bankruptcy given to the United States under 11 U. S. C., A., Sec. 101, as that statute was worded prior to its amendment June 22, 1938. The Court said (p. 8):

> "In view of the foregoing considerations, our conclusion is that the suit was properly brought in the name of the United States. *In this holding, however, we do not mean to be understood as deciding that the suit might not be brought by one or more of the creditors in the name of the United States.* See *Howard vs. United States*, 184 U. S. 676, 22 S. Ct. 543, 46 L. Ed.

754; *United States vs. Abeel, supra*, page 19." (Italics supplied.)

Where a policy, indemnifying insured against liability for negligently operating an automobile, was found to have been so worded as to be for the benefit of third persons, the Circuit Court of Appeals, Fifth Circuit, said:

> "The policy nowhere provides that an injured person may not sue the insurer to enforce his judgment" against insured. "The conclusion is inescapable, as it seems to us, that appellant's policy confers a benefit upon an injured person who recovers a judgment against the assured in an action for damages coming within its provisions."
>
> *Ohio Casualty Ins. Co. vs. Beckwith* (C. C. A. 5), 74 Fed. (2d) 75, 78.

> "The right of laborers and materialmen to recover on a bond executed in connection with public works or improvements, where the bond contains a condition for their benefit and is intended for their protection, *although the public body is the only obligee named therein, and there is no express provision that such parties shall have any rights thereunder*, is affirmed by the great weight of authority." (Italics supplied.)
>
> Annotation at 77 A. *L. R.* 83-89.

The effect of the distinction between intention of parties to a bond to confer substantive rights on a third party and intention to give a remedy for enforcement of those rights is thus noted in an annotation at 77 A. *L. R.* 29-30:

> "Yet it may be doubted that the intention of the parties as to whether the laborer or materialman should have a right to sue on the instrument will be controlling on the courts. *The intention of the parties controls in the creation of a right under the bond; but once the*

right is created, the law furnishes the remedy irrespective of the intention of the parties." (Italics supplied.)

For other authorities on the right of a private person to sue on a bond running to a governmental agency, see Subdivision III (b) of this brief, on the point that such persons are not deprived of beneficial interest in an official bond merely because the only obligee named is a public agency.

Surety's Authorities Discussed.

The authorities hereinafter cited have been cited by the surety and the courts below as disproving our right to sue. We respectfully submit that these authorities are either distinguishable on the ground that different fact situations were involved, or are not controlling in the face of *Howard vs. United States*, 184 U. S. 676, and the other cases we have cited above.

From *Idaho Gold Reduction Co. vs. Croghan* 6 Ida. 471, Judge Nordbye, the trial judge, quoted:

> "We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute."

Obviously, the Idaho Court, in its short opinion which shows that it did not give to the case the thorough consideration that this Court gave to the *Howard Case, supra*, overlooked thereby the point that authority of a third party to sue on a federal official's bond may be found in *legal intendment* of the statute that requires the bond, as well as in a statute that explicitly confers the right to sue.

When the *Howard Case* was before this Court, plaintiffs in error cited the *Idaho Gold Reduction Co. Case* as

supporting a contention that an official bond must be deemed to be for the sole benefit of the governmental agency requiring it, in the absence of a statute giving a right of action to individuals (see 46 L. Ed. 754, 2d col.). Having reached a conclusion contrary to that contention, it is perhaps not strange that this Court did not mention the Idaho Case in its opinion. But it is significant that this Court found two other cases cited by petitioners in error on the same point deserving of mention to the extent of distinguishing them from the *Howard Case*. (See 46 L. Ed. 761, 1st col.)

That a postmaster is under legal duty to users of the mails was recognized by the Idaho Supreme Court in the last cited case, where the Court said:

> "That the postmaster is liable to a private person for money or property lost through the negligence or wrongful act of the postmaster or his assistants or servants is, we think, established by the authorities; but we have found no case where such recovery was had or sought by action upon the postmaster's bond to the United States. (*Bishop vs. Williamson*, 11 Me. 495; *Bolan vs. Same*, 1 Brev. 181; *Coleman vs. Frazier*, 4 Rich. 146, 53 Am. Dec. 727; *Christy vs. Smith*, 23 Vt. 663.)"

In the face of this recognition of duty, the Idaho Court's conclusion that a private person cannot recover on a postmaster's bond can be sustained on no other theory than that a bond securing the performance of *all* of a postmaster's duties does not mean all of his duties, but only those due the United States, where the bond is payable to the United States only.

It will be noted that the Idaho Court excludes from consideration any question of legal intendment, excepting the fact that the obligee named in the bond is the United States.

By stressing the point that there was no statute expressly permitting a private party to sue on the bond, as in the case of a marshal's bond, the Court ignored all considerations of legal intendment that were applied by this Court in the *Howard Case*.

Furthermore, the opinion of the Idaho Court indicates that the decisive factor in the case before it was the following:

> "It does not appear from the complaint, otherwise than by the reference to the Revised Statutes of the United States, to whom the bond was given, or what were the conditions thereof. * * *
>
> "That an action can be brought upon the official bond of a postmaster by a private party alleged to be injured by the wrongful conversion, by the postmaster, of moneys belonging to such private person, and that without setting forth or producing the bond, or a copy of it, in the record, is a proposition of which we can find no authority."

Judge Nordbye, also, cited (R. 83) *Wile vs. United States Fidelity & Guaranty Co.*, 6 Alaska 48, where it was held that a postmaster who paid a loss to the Government, caused by his deputy's embezzlement, was not entitled to sue on the deputy's bond for reimbursement, and where the Court said that the bond ran to the United States and was, by "its terms to protect the government." But that that decision is not in point here is shown by the reference we have already made to the decision in *Massachusetts Bonding & Ins. Co. vs. United States* (C. C. A. 7), 54 Fed. (2d) 1039. In the latter case, the Court also ruled that no recovery could be had on a deputy postmaster's bond given to the United States, for the benefit of the postmaster who had made good the deputy's shortage. But at the same time the Court distinguished between the right of recovery in such a case and the right of a

user of the mails to recover on such a bond.

It is obvious that the learned District Judge in Alaska who decided the *Wile Case*, *supra*, like the Supreme Court of Idaho, laid undue emphasis upon the facts that the bond in question named the United States as obligee and that there was no statute expressly giving a remedy to private parties on the bond. He rested his opinion solely, so far as precedents were concerned, on the Idaho Case and *United States vs. Griswold*, 8 Ariz. 453, 76 Pac. 596.

But the *Wile Case* does stress one thing that distinguishes it from the case at bar, and that is that, in that case, the postmaster could have protected himself against his assistant's default by taking a bond to himself. No kindred protection could have been secured by plaintiff in the case at bar.

Strangely enough, *Washington vs. Young*, 10 Wheat. 406, 6 L. Ed. 352, is relied upon both by the surety and by the lower courts as supporting their decisions; and by us as showing error in those decisions.

We take the position that the *Washington Case*, *supra*, is important in that it established the right of a private person to sue on a public bond by *legal intendment* of a statute not *expressly* conferring the right. The case takes on much greater importance, because this Court in *Howard vs. United States*, 184 U. S. 676, adopted the same doctrine. But we deny that the holding in the *Washington Case*—that a bond given to a municipal corporation by its lottery manager to execute his duties did not by legal intendment give a right to a ticket holder to recover on the bond the amount of a prize won by the ticket—helps solve the question here presented: Does the postmaster's bond statute, by legal intendment, give mail-users a right to sue?

The lower courts and the surety have stressed this Court's approval, in the *Howard Case*, of the holding in the *Washington Case*, that "generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent." But the learned trial judge overlooked the more important point that this Court, in the *Howard Case*, recognized and applied a qualification of the general rule laid down in the *Washington Case*, saying:

> "But it"—the decision in the *Washington Case*—"also sustains the proposition that consent may, under some circumstances, be assumed to have been given; that is, may arise by legal intendment."

Then this Court, in the *Howard Case*, proceeded to distinguish that case from the *Washington Case*. And what was said on that point (184 U. S. 691-692) is sufficient to distinguish the case at bar from the *Washington Case*. This Court said that the corporation of Washington was authorized to establish lotteries or a "temporary and local" object—to make public improvements. "It is not unreasonable to suppose that in taking such a bond the corporation had in mind to protect itself in making the public improvement." But, on the other hand, the federal courts were established so that "jurisdiction might be invoked by all entitled to do so, and the requirement that the clerk should execute a bond for the faithful discharge of his duties and for the seasonable recording of the judgments, decrees, and determinations of the Court—no distinction being made between public and private suitors—was an assurance to all suitors that, within the limit of the penalty of any bond taken from him by the Government, their rights could be protected

against any act or omission on his part resulting to their injury."

The same reasoning requires that the case at bar be distinguished from the *Washington Case*. Post offices were established not only for both private and governmental use, but principally for use in private affairs. The requirement that the postmaster should execute a bond for the faithful discharge of his duties under the postal laws and regulations—no distinction being made between duties to senders and addressees of private mail, and duties to the Government as the Government's agent in serving the public—"was an assurance to all" users of the mails "that, within the limits of the penalty of any bond taken from him by the Government, their rights would be protected against any act or omission on his part resulting to their injury."

Fosmire vs. National Surety Co., 229 N. Y. 44, 127 N. E. 472, is, also, cited against us. There the Court did not hold that express statutory authority is essential to enable a private party to sue on a public bond. In fact, the contrary was plainly intimated in the extract from Mr. Justice Cardozo's opinion quoted below. The single holding in the case was that a state highway contractor's bond to faithfully perform the work, to pay wages of laborers, etc., was so worded as to negative legislative intention that the bond should inure to the benefit of the contractor's employees. The opinion says:

> "We think the cause of action is in favor of the people"—the State—"solely. * * * In so holding, we put our decision upon the single ground that *the bond, read in its entirety, is inconsistent with an intention that the plaintiff and others in like position should have the right to sue upon it.* If the intention is absent, the right to sue will be denied. * * * For the pur-

pose of this opinion, we assume, without attempting to decide, that when such an intention is revealed, there is no legal obstacle in the way of its enforcement." (Italics supplied.)

In the last cited case, there was no claim that plaintiff could not sue, merely because there was no statute expressly authorizing him to sue. The decisive question there was, as in the case at bar, whether the statute requiring a bond negatived intention to benefit third parties. The bonds in the two cases are so differently worded and cover such dissimilar subject-matter as to make the holding in the New York case of no weight here, excepting that it is in line with *Howard vs. United States*, 184 U. S. 676, on the point that third parties can sue on a public bond when it shows an intention that they shall be protected by it.

Any reliance that the Surety Company in the case at bar may make on the New York case must overlook this difference in situations involved: A postmaster, like the federal court clerk in the *Howard Case*, undertakes the performance of duties both to the Government and to users of the mail —principally to the users of the mails, the duties to the Government being those largely arising as an incident to serving the public. On the other hand, a highway contractor's undertaking is merely to do work in accordance with plans and specifications. Laborers are free to refuse to work for him on a state highway job, unless satisfactorily assured that they will receive their pay. The contract to build the highway is not for their benefit. But post offices exist primarily for the benefit of private users of the postal service, who have no means of protecting themselves; protection must come, if at all, through the Government's manifestation of intention that they be protected.

The *Fosmire Case, supra*, was discussed and distinguished in *United States vs. Globe Indemnity Co.* (C. C. A. 2), 26 Fed. (2d) 191, 192, in the latter Court's holding that a bond of a carter of imported goods to be "responsible to the United States for all loss, injury, or damage to merchandise" in his custody, was for the benefit of owners of the goods, as well as for the benefit of the United States. The Court, disregarding the *Fosmire Case*, followed the rulings in the *Howard Case*, and other cases on which we rely and which we have hereinbefore discussed, including *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, and *United States vs. Ward* (C. C. A. 8), 257 Fed. 373.

Clark vs. United States, 60 Ga. 156, cited by the trial judge (R. 84), merely decided that an internal revenue collector's bond was so worded as to show intent to indemnify the Government alone.

As to remedies on a postmaster's bond: To the statement in *United States vs. Griswold*, 8 Ariz. 453, 457, 76 Pac. 602, that the sender of a registered package through the mails could not sue on such a bond, there are two answers: (1) The statement was dictum, because the only question presented for decision was whether or not the United States could sue on behalf of the sender. (2) The first conclusion reached by the Arizona Court—that a postmaster's bond is broken when he defaults in a duty to a sender of mail—would have necessitated a holding that the sender could have sued on the bond, under the doctrine of *Howard vs. United States*, 184 U. S. 676, had his right to sue been before the Court. The decision that a postmaster's bond was liable for loss resulting from the principal's violation of official duty to users of the mail, and that the Government could sue on the bond on behalf of the injured party, favors our position. The dictum that a user of the mail cannot sue on his

own behalf cannot hurt us, in the face of authorities hereinbefore cited.

IX (a).

Congress Has Prescribed No Special or Exclusive Remedy, for the Benefit of Mail-Users, on a Postmaster's Bond.

(See Assignment of Error No. 5.)

The surety has energetically argued that, even if the postmaster breached his bond to plaintiff's sole and private injury, the surety has some sort of sacred right to be sued by the Government, albeit the Government would of necessity turn the recovery over to plaintiff. But the surety has not yet indicated wherein there is any vitality in the difference between an action brought *by* the United States, in its own name for the use of a mail-user, and an action by the mail-user in the name of the Government for his own use. We concede that if there were a statute prescribing by whom the action should be brought, it would have to be followed, if indicating mandatory intent. But there is no such statute.

It would not be just to the Government or to users of the mail to burden the Government with the litigation of private claims against postmasters, or their sureties, whether based on tort or their bonds. There is no reason why the Government should incur the expense of maintaining suits to enforce payment of damages privately sustained. Nor would it be just that the Government take from private claimants the right to prosecute their claims through their own attorneys. Congress has not expressed a purpose to do any of these things. The Department has no power to do so.

As the Wisconsin Supreme Court said in *State vs. Dahl*, 150 Wis. 479, private beneficiaries of a public official's bond

"must (if they are to receive the full benefit of the promise) have some way of enforcing its provisions, not dependent upon the will of others who have no beneficial interest in the promise."

A suggestion made at page 30 of the surety's reply to the petition for certiorari, that the Department has opportunities superior to those of the courts for determining *whether or not suit should be brought* on a postmaster's bond for the benefit of a mail-user, and whether or not the bond has been broken, is so repressive of the rights of the people as to bear its own refutation. One aggrieved by breach of a postmaster's bond is not to be denied a remedy for the breach at the whim of an administrative officer of the Government.

Whether a bond has been broken is a matter for the Courts to determine, whether an action be brought by the Government, or by a private mail-user, in the name of the Government, to redress a wrong against him.

If, as recognized in *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, a mail-user has a right to maintain a private suit against a postmaster to enjoin misdelivery of mail, to avoid resulting damage, why should he not be permitted to maintain a suit to recover damages resulting from misdelivery, whether the action be for the postmaster's tort or on his bond, unless there is a statute expressly denying the right to maintain a private suit? (We do not digress to discuss the point whether such a statute would be constitutional, unless it should provide statutory machinery under which the Government would be bound to sue for the benefit of the aggrieved mail-user.)

If this Court should find that a postmaster's bond was intended by Congress to protect private mail-users as well as the United States, that would necessarily involve a conclusion in line with that reached in *Howard vs. United*

States, 184 U. S. 676, "therefore no *statute* forbidding it, a private" mail-user "may bring an action thereon for his benefit in the name of the obligee, the United States."

So, to sustain the form in which plaintiff has sued, there remains for consideration only the subsidiary question, is there a *statute forbidding* suit in that form?

Defendants cite no forbidding statute.

In moving to dismiss this action, the surety insisted that *Postal Laws and Regulations, 1932*, Sec. 816, provided "the sole, exclusive and only method of recovery on the bond here involved" (R. 64, 66). In its reply to our petition for certiorari (pp. 12-13, 29-30) substantially the same contention is made.

In the next subdivision of this argument, we discuss the effect of Sec. 816. For present purposes, we dismiss it on the ground that a *departmental regulation* cannot be regarded as *an act of Congress*, within the doctrine of *Howard vs. United States*, 184 U. S. 676, which holds that where an official bond is found to be for the benefit of private persons a legal intendment that a private person may sue on the bond in the name of the United States follows from an omission by *Congress* to prescribe another and exclusive remedy. Specifically, the language of the *Howard Case* is

> "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and, therefore, *no statute forbidding it*, a private suitor may bring an action thereon," etc. (184 U. S. 693). (Italics supplied.)

It has not been asserted by either of the Courts below or by either of the defendants that there is any statute that expressly forbids this action, in the form in which it has been brought. But it is attempted—particularly by the surety—

to draw a prohibitory inference from 28 *U. S. C. A.*, Sec. 732. That section is entitled "Suits for duties, imposts, taxes, penalties or forfeitures," and reads:

> "All suits for the * * * enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or * * * vessels, or the internal revenue; or direct taxes, and *all suits arising under the postal laws*, shall be brought *in the name of the United States*." (Italics supplied.)

This is the only statute that is cited against our right to maintain this action, assuming that mail-users are co-beneficiaries with the Government under a postmaster's bond.

As to Sec. 732, our position is as follows:

(1) One reasonable interpretation of the statute, if not the only permissible one, considering the context of the entire section, is that the statute is limited to suits for the recovery of *duties, imposts, taxes, penalties* and *forfeitures*. That is plainly indicated by the catchwords at the head of the section. That is the interpretation that was given to the section in *Williams vs. Wells Fargo & Co. Express* (C. C. A. 8), 177 Fed. 352. There the Court said (pp. 355-356):

> "This is beyond all peradventure a suit to recover a *penalty arising under the postal laws* as provided in section 919 above quoted"—28 *U. S. C. A.*, Sec. 732.

In *United States vs. Hartford Accident & Indemnity Co.* (D. C., Md.), 15 Fed. Supp. 791, 804, the Court held that a suit on a bond, conditioned for compliance with an internal revenue permit concerning alcohol and for the payment of taxes and penalties, was not an action to recover a penalty. There the opinion disagrees with *United States vs. Jolles*, 251 Fed. 417, not on the point that a suit on a bond to recover compensation for a loss is not an action for a penalty, but on

the point that an action on a bond to recover a penalty is an action for a penalty.

An examination of *Brady vs. Daly*, 175 U. S. 148, 154, 155, shows that it fully supports the decision of the Court in the *Jules Case*, on the point that an action to recover compensation for loss sustained through violation of a statutory right is not an action for a penalty.

That it has not been generally regarded that every suit that arises under the postal laws falls within Sec. 732, is shown by numerous cases in which private actions have been brought against postmasters in their official capacity. See, for example, *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, a private suit to enjoin misdelivery of mail, where jurisdiction was upheld on the ground that the suit was one arising under the postal laws.

(2) Sec. 732 does not in express terms require any action covered by it to be brought *by* the United States. It merely declares that actions covered by it shall be "brought in the name of the United States." The action at bar is brought in the name of the United States.

As shown by the catchwords preceding the text of Sec. 732, the statute deals with "Suits for duties, imposts, taxes, penalties, or forfeitures." Does not the context of the entire section manifest a legislative purpose to limit the statute to suits of the nature described in these catchwords?

The surety cites *Williams vs. Wells Fargo & Co. Express* (C. C. A. 8), 177 Fed. 352, as showing that Sec. 732 applies to the case at bar. But that was an action by an informer to recover his *share* of a *statutory penalty*, in which the Government had an equal pecuniary interest. The Court merely decided that under a statute prescribing a penalty for private carriage of mail, and under another statute providing

that penalties recovered for violating any law affecting the Post Office Department or its revenue or property should be divided one-half to the informer and the other half to the Treasury for the benefit of the Department, an informer could not sue in his own name for his share of the penalty. The Court explicitly recognized that where an informer is entitled to one-half of a penalty recoverable by the Government, he would, *by necessary implication*, have a right to sue in his own name and to the use of himself and the Government, in the absence of a statute to the contrary.

At page 29 of its reply to the petition for certiorari, the surety company argues that funds recovered in suits brought under Sec. 732 must first go into the federal treasury to be "by the United States disbursed *in such manner as it determines*." (Italics supplied.)

The surety company relies particularly on what was said in *The Stella B* (D. C., E. D., N. Y.), 183 Fed. 507, 512: "But a general *penalty* provided by a law of Congress and *not particularly specifying that the penalty shall go to somebody else* must carry with it the payment of the penalty into the treasury of the United States." (Italics supplied.) There are at least two answers to a reliance upon that declaration:

(a) An action on an official bond, to recover for a loss sustained through breach of the bond, such as is the action at bar, is not one to recover a *penalty* within the meaning of Sec. 732.

In *United States vs. Jokes* (D. C., Mass.), 251 Fed. 417, the Court thus distinguished an action on a bond to recover a *penalty* and an action on a bond to recover for a *loss* (p. 418):

"It seems to me that the question must depend upon the character of the liability sought to be enforced. If

it is based upon a loss sustained by the plaintiff, and is awarded as compensation for injury done, it is not a forfeiture or penalty, even though the amount awarded may exceed the damages proved." *Brady vs. Daly*, 175 U. S. 148, 154, 155. * * *. On the other hand, if the sum claimed has no relation whatever to any loss sustained by the plaintiff, but is arbitrarily exacted for some act or omission of the defendant, it would be essentially penal. *Wisconsin vs. Pelican Ins. Co.*," 127 U. S. 265, 292, 293.

(b) It is obvious that in the declaration above quoted from *The Stella B*, 183 Fed. 507, 512, the Court had distinctly in mind only cases where Congress had not indicated a purpose that a penalty should go to any one other than the Government. It excluded cases where Congress has specified that the penalty shall go to someone else. True, the Court refers to a *particular specification* by Congress. But would not the opinion be unsound if interpreted as intimating a vital distinction between an intention of Congress particularly specified, and an intention of Congress arising from necessary implication? There are sound reasons why a penalty or other recovery should go into the federal treasury where there is no Congressional hint as to who shall be beneficiaries of the fund. On the other hand, it would be useless, if not senseless, to require that a recovery, in which the Government could have no pecuniary interest, pass through the federal treasury when it necessarily would be payable to a private beneficiary indicated by an act of Congress, whether the indication be express or implied.

The surety company's insistence that a recovery of plaintiff's private loss should pass into the hands of the Government to be "disbursed in such manner as it determines" is amazing.

In *Regina vs. McPherson*, 13 U. C. C. P. 17, the Canadian Court of Common Pleas held that, although the Canadian Post Office Act authorized the Postmaster General to sue on a postmaster's bond in his official name, the Crown still retained its right to bring sci. fa. against the bondsmen.

Thus it will be seen that this action was brought in proper form whether or not it is an action covered by 28 *U. S. C.* A. Sec. 732. If that section does not apply, then there is no statute forbidding suit in the name of the United States by an aggrieved beneficiary of a postmaster's bond. If the section does apply, it makes no further requirement than that the action be brought *in the name of the United States*, without expressly or impliedly requiring the action to be brought *by* the United States when it has no pecuniary interest in the subject-matter.

That Some Statutes Requiring Bonds of Other Federal Officials Expressly Confer a Remedial Right on Private Persons Does Not Negative Congressional Will or Intent to Confer Such Right on Mail-Users.

Overlooking the doctrine of *Howard vs. United States*, 184 U. S. 676, which accords a right of action to all beneficiaries of an official bond, *where Congress has not forbidden that remedy*, Judge Nordbye, the trial judge, suggested that there is significance in the fact that there is *no statute expressly permitting private parties to sue* on postmasters' bonds, whereas there is such provision in the case of marshals', consular officers' and public contractors' bonds (R. 87).

The same suggestion was made in the *Howard Case* and was there rejected, this Court saying:

> "We are of the opinion that this argument, although not without force, ought not to prevail against the legal

intendment of the statutory provisions relating to clerks, who hold a peculiar relation to the courts appointing them, as well as to the public" (184 U. S. 694).

In Subd. VII (c) of this brief and other subdivisions of our argument hereinbefore presented, we have attempted to demonstrate that postmasters stand in much closer and more important relationship to mail-users than Federal Court clerks do to private litigants.

Lammon vs. Feusier, 111 U. S. 17, was an action on a United States marshal's bond, given for faithful performance of his duties (see 28 *U. S. C. A.*, Sec. 496). This Court decided that a marshal was personally liable for wrongful levy and added:

> "But the remedy of a person, whose property is wrongfully taken by the marshal in officially executing his writ, is not limited to an action against him personally. His official bond is not made to the person in whose behalf the writ is issued, nor to any other individual, but to the Government, *for the indemnity of all persons injured by the official misconduct of himself*," etc. (Italics supplied.)

It will be noted that Sec. 496 does not specify who shall be beneficiaries of the bond. Therefore, so far as *substantive rights* are concerned, there is as good reason for holding that a postmaster's bond, under 39 *U. S. C. A.*, Sec. 34, is as much for private benefit as is a marshal's bond, because each is conditioned for the faithful performance of official duty.

It is true that, as to marshals' bonds, there is a *separate* statute that specially provides that, "in case of a breach of the condition of a marshal's bond, any person thereby injured may institute *in his own name and for his sole benefit* a suit on said bond," etc. (28 *U. S. C. A.*, Sec. 500). In the *Lam-*

mon Case, this Court gave effect to that statute by adding to what we have above quoted from the opinion: "and his bond may be put in suit by and for the benefit of any such person."

As we read 28 *U. S. C. A.*, Secs. 496, 500, as applied by this Court in the cited case, Sec. 500 deals only with *remedial* rights. A *substantive* right in private persons rises from the language in Sec. 496, "faithful performance of duties." When Sec. 500 specifies a special *remedy* for enforcement of the right, it does not enlarge the natural meaning of the last quoted words.

Howard vs. United States, 184 U. S. 676, was decided 18 years after the *Lammon Case*, and the absence, as in the case at bar, of any special statute specifying any remedy in favor of a private person was not held to preclude a remedy. This Court said:

> "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and, therefore, *no statute forbidding it*, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States."

Whatsoever may be the effect of the decision in the *Lammon Case*, the point remains that the case at bar is squarely within every principle recognized in the *Howard Case*, including principles applicable to remedy as well as substantive right. We have referred to the *Lammon Case*, partly because of an allusion made to it in the *Howard Case* and partly because the trial judge in the case at bar attached importance to the fact that there is a statute prescribing a remedy on a marshal's bond (R. 87).

Any argument that because Congress has specified that private beneficiaries may sue on bonds of marshals, con

sular officers, and contractors, [redacted] private beneficiaries may not sue on the bond of a court clerk, or postmaster, merely because Congress has omitted to specify a remedy, falls well within the spirit of what this Court said in *Keifer & Keifer vs. Reconstruction Finance Corp.* (Feb. 27, 1939), 83 L. Ed. 512, 515. It will be remembered that in the cited case the Court found that the Regional Agricultural Credit Corporation was subject to suit, although there was no statute expressly authorizing it to be sued. After observing that Congress may create corporations to execute governmental powers, the Court said:

> "But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted. In the context of modern thought and practice regarding the use of corporate facilities, *such a clause is not a ritualistic formula which alone can engender liability* like unto indispensable words of early common law, such as 'warrantizo' or 'to A and his heirs,' for which there were no substitutes and without which desired legal consequences could not be wrought.
>
> * * *
>
> "Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so?" (Italics supplied.)

This Court's statement that "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work," fully answers any attempt that may be made by the surety in the case at bar to usurp the postmaster's official position as armor.

IX (b).

No Departmental Regulation Purports to, or Could, Prescribe an Exclusive Remedy on a Postmaster's Bond.

Although defendants have persistently confused the question of substantive right to benefit under a bond, with the question as to what sort of remedy is available when the substantive right has been established, we glean from their replies to the petition for certiorari, as well as from their briefs in the lower court, that they rely on *Postal Regulations*, Sec. 816, and 28 *U. S. C. A.*, Sec. 732, as denying the plaintiff's right to maintain the action in the name of the Government.

In the preceding subdivision, we have discussed the effect of the statute, Sec. 732.

As to the regulation, Sec. 816, there are, of course, several obvious answers:

(1) Even if a department regulation purported to forbid a private mail-user from suing in his own name, the regulation could not be regarded as a "statute" forbidding suit in that form, within the meaning of what this Court said in *Howard vs. United States*, 184 U. S. 676.

Sec. 816, having been adopted by a mere administrative department of the Government, could not limit a right to sue given by Congress, through legal intendment, any more than it could limit a right to sue given by express statutory provision. No department of the Government has power to adopt a regulation inconsistent with an act of Congress, and no delegation of legislative power to a department arises from the power given to adopt regulations.

The power of the Postmaster General to adopt regulations is limited by 5 *U. S. C. A.*, Sec. 22:

"The head of each department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business," etc. (Italics supplied.)

The effect of this statute has been thus limited:

"Here is a power conferred by the authority of Congress upon the head of each department, and is in no sense a delegated power of legislation."

Butler vs. White (C. C., W. Va.), 83 Fed. 578 (reversed on other grounds, *White vs. Butler*, 171 U. S. 379).

If there be any regulation of the Post Office Department that purports to limit either the substantive or the remedial right of a mail-user under a postmaster's bond it must fall under the principle involved in *Morrill vs. Jones*, 106 U. S. 466. There the Secretary of Treasury had attempted by regulation to restrict application of a statute governing admission, free of duty, of breeding animals, by limiting its operation to animals of "superior stock." This Court said:

"In our opinion, the object of the secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

(2) Sec. 816 does not authorize actions on postal bonds. It merely provides for departmental demands against postal *employees* and postal contractors for losses arising in certain cases, and for suits by the United States to directly recover for the losses where such demands are not met.

(3) If the regulation could be stretched into *authorizing* a suit on a postmaster's bond to recover for a breach affecting only a user of the mail, there would still be nothing in it

to indicate that this was intended to be an *exclusive* remedy on the bond. Subd. 6 of the regulation provides for a determination by the Solicitor of the Department as to "the *advisability* of suit by the United States." After receiving the Solicitor's reply, the Chief Inspector shall, "*if he deem proper*, prepare the *request* of the Postmaster General upon the Solicitor of the Treasury for suit."

(4) By providing for payment of recovery on claims "to the United States *and* to senders or owners of the mail as their interests shall appear," the regulation clearly shows that it was intended to apply only to cases where there was a joint loss and not to a case like this where the Government sustained no loss. Sec. 816 (7).

In *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, the company sued a postmaster to enjoin misdelivery of mail to another company. Obviously, the suit involved the same general principles that govern a claim for damages resulting from an accomplished misdelivery. Commenting upon the fact that the acting solicitor of the Department had given instructions concerning delivery of the particular mail, but had directed that the postmaster "comply with any instructions that may be issued by the court with respect to the delivery of this mail," the Court said:

> "This advice was probably given in view of the fact that *a court would be in better position to hear the evidence and determine the respective rights of the parties*, and particularly the changed conditions that might arise in the course of time. Under these circumstances, it was perhaps proper, and undoubtedly to the advantage of all parties concerned, including the Post Office Department, that this action should have been filed in court, where the witnesses could be examined under oath, and the conditions then obtaining be determined with greater

accuracy than would be possible for the Post Office Department upon the mere conflicting statements of rival claimants."

The additional statement in the opinion in the last cited case, to the effect that, under ordinary circumstances, the question as to who was entitled to delivery of mail would be left to the *discretion* of the Department, cannot be applied to a case like the one at bar, where a mail-user has sustained loss through a postmaster's clear violation of postal laws and regulations. If a postmaster's bond covers mail-users, and the bond is violated, there is no room for the exercise of discretion on the part of the Department.

X.

The Attorney General's Refusal to Approve the Bringing of This Suit Does Not Defeat the Right to Sue, Because, as He Ruled, No Interest of the Government was Involved.

At page 15 of its brief in reply to our petition for certiorari, the surety company states that the Attorney General "caused to be filed a brief *amicus curiæ* adverse to petitioner" (R. 53, 54). This reference to the Record is to a statement made by the trial judge:

> "The only indication that the Court has received as to the Government's position in the matter is a brief filed during the trial by the United States Attorney of this district as *amicus curiæ* in support of the defendant surety company's position that the *plaintiff has no right to bring this action on this bond.*"

The brief referred to did not challenge the plaintiff's *right to sue* on the bond, as distinguished from *right to benefits* under the bond. The brief was limited to an attempt to show

that the coverage of the bond was intended to be limited to "fiscal and fiduciary relations * * * between the postmaster and the United States." After citing statutory provisions that are also cited in Judge Nordbye's opinion, the brief argues:

> "It would seem plain from this situation and from the various provisions relating to the liability of the postmaster and his sureties under the bond, that the bond was intended solely to protect the government in respect of the postmaster's responsibility to it and did not contemplate any liability to the public."

As to the surety's assertion that neither the Post Office Department nor the Attorney General ever dreamed that a private mail user could sue on a postmaster's bond, we question the right of the surety to speak for either the Department or the Attorney General, and the existence of anything in the Record that supports the assertion.

Recognition of the right of an individual to sue on a postmaster's bond can be of no practical concern to the Government, if it be assumed that Congress intended that the bond cover individual losses, as well as losses of the Government. This is specially true where, as here, the Government asserts no claim against the bond.

Neither the Postmaster General nor the Attorney General has sought to be made a party to this action. In fact, the Attorney General expressly declined to become a party. In response to a letter written to that official by plaintiff's attorneys (R. 59-60), he stated:

> "*This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest*, but as stated by you, *the claim is the exclusive property of your client.* The bond of the Act-

ing Postmaster was executed in accordance with the provisions of *R. S.* 3834, as amended, *U. S. C.*, Title 39, Section 34. *Whether the sureties on a bond executed in accordance with the provisions of this section are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General.*

"In the circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it" (R. 58-59). (Italics supplied.)

Thus the case falls perfectly within what the Wisconsin Supreme Court said in *State vs. Dahl*, 150 Wis. 479, cited in Subd. IX, *supra:*

"* * * Where, as here, the Attorney General has refused, as he doubtless properly may, to bring the action, because the state has no beneficial interest in it, there seems no good reason which should prevent the bringing of the action in the name of the obligee on the relation of the parties beneficially interested."

XI.

The Case Falls Within the General Rule That the Beneficiary of a Contract Has a Right to Sue to Enforce Payment of the Benefit.

Until now we have mainly limited our argument to the legal effect of official bonds—not upon an assumption that such bonds constitute a species unrelated to contracts in general, but because the decisions of this and other Courts in official bond cases settle the law of this case.

However, in view of the effort made by the surety to limit the effect of *Howard vs. United States*, 184 U. S. 676, and other authorities relied on by us, we deem it appropriate to

draw attention to the analogy between the right of a third party to sue on an official bond and the right of third parties to sue on contracts in general.

We concede that *Robins Dry Dock & Repair Co. vs. Flint*, 275 U. S. 303, cited by Judge Nordbye, the trial judge (R. 84), is conclusive on the point that a third party to a contract must show a benefit under the contract before he can sue on it. But the converse is also necessarily true, and if we have shown that postmasters' bonds were required by Congress for the benefit of users of the mail, as well as the Government, then we have a right to sue.

The mere facts that this action is brought on a postmaster's bond, and that the nominal obligee, so far as concerns this controversy, is the Government, cannot require that the subject be classified as belonging to a rare legal species that bears no relationship to the law that governs contracts in general. The bond otherwise falls within the well-established American rule that "where a person makes a *promise* to another for the benefit of a third person," the third person may sue on the promise, subject to certain qualifications. (See 13 *C. J.* 705-711, Secs. 815-817.)

That the Government is the nominal obligee strengthens rather than weakens application of the last stated rule to the case at bar, because the Government exists only "for the people."

Ohio Casualty Co. vs. Beckwith (C. C. A. 5), 74 Fed. (2d) 75, 78, recognized that the right of a third person to sue on policy indemnifying insured against liability for negligent operation of an automobile, fell within the rule applicable to contracts in general. The Court said:

> "If appellant had agreed to pay a debt which the assured owed to appellee, the latter would have had

a clear right to enforce the contract. *There is no difference in principle in the obligation assumed by the policy.*" (Italics supplied.)

In an extensive note commencing at 81 *A. L. R.* 1271, under the head, "Right of third person to enforce contract between others for his benefit," application of the general principle involved is shown to have been made in cases involving a bailor's right to sue on a policy issued to a bailee and upon various classes of bonds, as well as in many cases involving other classes of contracts (pp. 1296-1299).

The case at bar is not to be regarded in any sense as *sui generis* until and unless it appears that it does not fall well within well-established general principles.

In an action on bonds for faithful performance of official duties, the Ohio Supreme Court said in *American Guaranty Co. vs. McNicce*, 111 Ohio St. 532:

> "We have no patience with any theory which would permit each separate case of a class which may be determined by the same general principles to become *sui generis*, for the reason that the doctrine of *sui generis* tends to supplant the fundamental principle that rights and liabilities are such by law, rather than by the conscience of the particular tribunal which may be called upon to determine them."

CONCLUSION

The foregoing argument is relied upon as demonstrating:

1. That Congress intended that private mail-users should be co-beneficiaries with the Government in the protection afforded by postmasters' bonds.

2. That there is no statute forbidding the bringing of the suit in the form in which it has been brought, and that, therefore, the remedy pursued is within the intendment of Congress.

As a resumé of our argument, we adopt, and respectfully refer the Court to, the points stated in the Index, under the head of "Argument."

To accord to mail-users the benefit of a postmaster's bond for the faithful performance of *all* of his duties is consonant with both the spirit and the letter of the statute which requires the bond.

In this connection, we draw attention to the decision of this Court in *Postmaster-General vs. Early* (1827), 12 Wheat. 136, an action on a postmaster's bond. There, Mr. Daniel Webster and co-counsel argued that a bond given for faithful performance of the postmaster's duties and for accounting to the Government was void, because, when the bond was given, there was no statute authorizing the taking of a bond for faithful performance of duties other than to account to the Government. As showing that this Court regarded a condition of a bond for faithful performance of a postmaster's duties as covering *official conduct in general*, we quote from the opinion of Chief Justice Marshall in that case:

> "Even supposing this bond to be void, so far as it is intended to stipulate for the performance of official duties, it is not necessarily void, so far as it stipulates for

the payment of money of the United States, which might come to the hands of the deputy-postmaster. *That part of the condition* which shows the bond was taken to secure the payment of money which should be received for the United States, is not vitiated by *that part* of it which shows that it was *also* taken to secure the *general official conduct* of the deputy" (p. 149). (Italics supplied.)

Assuming that a private mail-user is a beneficiary under a postmaster's bond, every possible intendment favoring his right to sue in the name of the United States, with personal control over the litigation should be indulged, where, as here, the Government asserts no claim against the bond. This should be so, first, because it would be unfair to the Government to burden its legal officers with the enforcement of private rights, and to burden its treasury with the expense of what is in reality private litigation. It is so, second, because it would be oppressive to deny to the individual the right to control the prosecution of his own private claims.

The judgment of the Circuit Court of Appeals should be reversed, and the cause should be remanded for further proceedings to be had in accordance with the verdict returned by the jury in the District Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

UNITED STATES OF AMERICA, for the use and benefit of MIDLAND LOAN FINANCE COMPANY, a Corporation,

Petitioner (Plaintiff-Appellant below),

vs.

NATIONAL SURETY CORPORATION, a Corporation, and PATRICK J. MALONE,

Respondents (Defendants-Appellees below).

BRIEF OF RESPONDENT MALONE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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INDEX.

	Page.
SUMMARY OF CASE	1
A. Nature of Action involved	1
B. The damages claimed by plaintiff are consequential	3
C. Order overruling Demurrers	3
STATEMENT OF FACTS	5
A. Facts stated by Circuit Court of Appeals	5
B. Merits of the case not reviewable	8
C. The Bond	9
D. Statutes Involved	9
E. Regulations	9
F. Relation of Government to Bond	11
ARGUMENT	12

POINTS AND AUTHORITIES.

39 U. S. C. A., Sec. 34; 244	9
5 U. S. C. A., Sec. 377	9
28 U. S. C. A., Sec. 323	9
5 U. S. C. A., Sec. 22	9

POSTAL REGULATIONS, EDITION 1932, CITED.

Sec. 777	10
Sec. 816	10

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BRIEF OF RESPONDENT MALONE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

I.

A. NATURE OF ACTION INVOLVED.

This is an action on contract and not one sounding in tort.

This is an action on contract, namely, on an acting Postmaster's bond.

At page 2 of Petitioner's Petition, and Brief, it is incorrectly stated that this is an action brought on an acting Postmaster's bond "to recover damage sustained * * * through the acting postmaster's tortious misdelivery of mail."

It is not an action against a postmaster sounding in tort as intimated. The Circuit Court of Appeals so indicates as shown by the following language:

> "It will be observed that this is *not an action against a postmaster sounding in tort.* * * * It is an action on a bond by a stranger to the contract brought without the consent of the obligee."

Further the opinion of Judge Nordbye so indicates:

> "The action was brought by the plaintiff, Midland Loan Finance Company, in the name of the United States, as above indicated, to recover damages against the principal and surety on a postmaster's bond * * *. The complaint sought to recover the sum of $34,997.03 against the principal and $16,000.00 against the surety. Subsequently, the plaintiff limited its right to recover against both defendants to the amount of the bond" (70).*

Plaintiff in open Court, as above stated by Judge Nordbye, limited its amount of claim against Malone to the amount of the bond, that is Sixteen Thousand Dollars (63).

The action, both in the lower Court and the Circuit Court of Appeals, was tried on the theory that this was an action on a contract, the bond in question, and not one sounding in tort as suggested by petitioner. It is elementary law that plaintiff after trial and appeal cannot shift or change his theory of liability and urge a new theory not before suggested.

---

*Note: Unless otherwise indicated, the figures in parentheses refer to pages of the printed record.

B. THE DAMAGES CLAIMED BY PLAINTIF ARE CONSEQUENTIAL.

Petitioner states that this action is brought to recover *damages sustained.* This statement is inaccurate in this, that the action was one to recover *consequential damages,* and should be so characterized.

This action was not commenced to recover the value of the letters sent, but to recover the loss sustained by petitioner because of forgeries and other criminal acts perpetrated by one Hunting (3-18).

The Circuit Court of Appeals indicated by the following language that it considered petitioner's action as one seeking consequential damages:

> "On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, without the consent of the government, upon the official bond of an acting postmaster *to recover consequential damages* resulting from the delivery of mail to one other than the addressee without the written consent of the sender?" (102)

C. ORDER OVERRULING DEMURRERS.

Defendants interposed separate Demurrers to plaintiff's complaint. They were overruled by Judge Joyce (25-30).

At page 3 of the petition it is incorrectly stated that Judge Joyce based his decision on the *Howard case* (184 U. S. 676). Judge Joyce's decision, in part, reads:

> "The defendants insist that consent of the Government to maintain the action is a prerequisite and that the damages are not proximate but remote. While the questions presented by the two demurrers are questions of law, and while doubt may exist as to the right of the Midland Company to maintain the action in the name

of the United States, the case of U. S. vs. Howard, 184 U. S. 676, involving recovery on a United States District Court Clerk's bond where Government consent was not obtained, seems to support the Midland Company's claim. On argument it appeared that the Midland Company had notified the Attorney General of the United States of the pendency of the action. It further appeared that Malone, following the events here recited, was made a regular postmaster. * * *

"Not being prepared at this time to say that a cause of action does not exist, and viewing the matter as one of Federal Law, and believing that with the submission of all the evidence a just determination can then easily be ascertained, and not attempting here an analysis of the cases presented by the very able briefs submitted, I have concluded that the demurrers should be overruled." (29)

Clearly Judge Joyce did not rule as claimed. In fact, the most he said was that there was doubt whether such right of suit by the Midland Company existed but that he felt that after submission of the evidence a just determination could be more easily ascertained.

The defendants interposed separate Answers (30-34) and the case came on for trial. At the close of the testimony separate motions for dismissal and directed verdict were made by each defendant, the Court reserving its ruling on said motions (62-63). Thereafter on separate formal motions after verdict, the Court granted the reserved motions (70-88). The action as against the Surety Company was dismissed "on the merits", on the grounds that plaintiff had no right to sue on this postmaster's bond (70-87). The Court also dismissed the action as to this defendant on the ground that if no right of action on the bond existed against the Surety Company, then the Court had no jurisdiction of

this defendant since plaintiff and this defendant were both citizens and residents of the State of Minnesota (88). Thereafter judgment was entered upon the above orders of dismissal in favor of said defendants and each of them. Appeal therefrom was taken (91-99) and determined adversely to petitioner by the Circuit Court of Appeals (101-107). Petition for rehearing was made (109-114) and denied (115).

STATEMENT OF FACTS.

A. Facts Stated By Circuit Court of Appeals.

The statement of facts set forth by the Circuit Court of Appeals is correct, and incorporated herein by reference (102-103).

Petitioner criticizes the statement of that Court that it is not claimed that the postmaster "had any knowledge of the fraud that was being perpetrated by Hunting," and claims that the same should be qualified, by stating that the testimony did not directly "establish that Malone was knowingly a party to the fraud."

The language of the Circuit Court of Appeals in this respect is as follows:

> "It is not claimed that any of the lost funds came into the possession of the acting postmaster, or that he had any knowledge of the fraud that was being perpetrated by Hunting." (103)

The record indicates this statement of the Circuit Court of Appeals is correct. Plaintiff's complaint charges the defendant Malone as follows:

> "Notwithstanding said duties and trusts, but wholly disregarding the same, and in violation of the United States Postal Laws and regulations and in breach of the

aforesaid bond, Exhibit A, defendant Malone and his said assistants and subordinates regulary, customarily, wilfully, negligently, and wrongfully delivered to said Hunting all of the mail communications and letters" (16).

Although the foregoing language is extremely exhaustive, at no place does the plaintiff *claim*, or *directly charge* the defendant Malone with knowledge of the fraud.

In his opening statement to the Court and Jury, counsel for petitioner was asked the following:

"Mr. Butler: I am asking whether or not I am to understand from your opening statement to the Court of what you intend to prove—whether the Court and Jury are to understand that you do not intend to prove corrupt motives on the part of Mr. Malone as averred in your complaint, and that is all I am asking. I have a right to know. I have an issue tendered me by the complaint, and I want to know whether it will be proven.

"Mr. Deinard: I would like to oblige Mr. Butler, but I don't think I can commit myself any further than I have.

"Mr. Butler: If your Honor please, at the conclusion yesterday afternoon, in order to make certain that the plaintiff had in mind pressing what he stated he intended to prove, I directed a question to him as to whether he intended to prove that this Postmaster here, in acting as it is claimed that he did, acted from corrupt motives in participating with Hunting in an effort to defraud the plaintiff, or whether it is the plaintiff's claim that the Postmaster was without corrupt motives, careless or negligent merely in the performance of whatever the regulations might require. To that query the defendant received no direct answer. Your Honor will readily appreciate that it makes a difference in the defense of the case whether one is called upon to

defend an action sounding in deceit or fraud, or one of negligence. The complaint sets forth one of those forms. The tender of proof to the Court suggests that another type of action will be presented. I wish, with your Honor's permission, to inquire whether this second type or whether the complaint relied upon will be proved. I think it is a fair question.

"The Court: Well, as I understood Mr. Deinard's statement, he said he did not think it made any difference whether his actions were prompted by a corrupt motive or by mere careless actions. I am not in a position to have counsel amplify their opening statements. I assume they stand on their pleadings.

"(fol. 56) Mr. Deinard: Well, I say, your Honor, it is not because I have any intention not to give counsel as categorical an answer as I can, but I don't know what Mr. Butler means by the use of the word 'Corruption.' So far as I am informed, now, without going through every word of the complaint, the word is not used in the complaint in connection with the defendant Malone" (46-47).

Further the opinion, in part, of Judge Nordbye, reads as follows:

"The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not directly establish that Malone was knowingly a party to the fraud. Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to convince Malone that it was perfectly proper for the 'Midland mail' to be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff" (72).

Thus Judge Nordbye, the trial judge, states the evidence did not directly establish Malone was knowingly a party to the fraud. His opinion does not state, as counsel would intimate, that the circumstantial evidence indicated that Malone did know of the fraud. Therefore, the statement of the Circuit Court of Appeals to the effect, "It is not claimed that he, (the postmaster), had any knowledge of the fraud being perpetrated by Hunting," is correct in view of the complaint, the statements of counsel for petitioner, and the statement of Judge Nordbye.

B. Merits of the Case Are Not Reviewable Beyond the Question of the Right of Plaintiff to Maintain An Action Upon the Bond.

At page 2 petitioner states that the jury finds the Postmaster misdelivered mail in violation of the Regulations, and that plaintiff sustained a loss of at least Sixteen Thousand Dollars.

The verdict of the jury was not involved in the decision of either Court and was not reviewed by the Circuit Court of Appeals. It is not before this Court. Motion was made to dismiss the action by defendant Surety Company, and by this defendant, after the close of the testimony, and before rendition of the verdict. The Court (with consent of all parties) reserved its rulings thereon, until after the verdict (63).

Consequently, although the trial court's decision was made after the verdict, it must be considered to have been made at the time of the motion, that is nunc pro tunc. Thus the verdict, or its effect, is not before this Court on this petition and is of no significance.

Further the verdict of the jury has no bearing upon the question involved, because it was merged in the judgment that was vacated, and set aside, by the trial court (88).

C. THE BOND.

At page 8 of the petition, petitioner sets forth the condition of the bond. The petition omits the following important fact, as stated by the Circuit Court of Appeals, namely:

> "The bond, given by the defendants as principal and surety, bound them, "*to pay to the United States of America, the sum of Sixteen Thousand Dollars*" (103).

D. STATUTES INVOLVED.

Under the heading of "Statutes Involved", the petitioner respondent cites two statutes, namely, 39 U. S. C. A. Sec. 34 and 5 U. S. C. A. Sec. 377.

The following statute is of such importance that it was cited by the Circuit Court of Appeals in its opinion as follows:

> "All suits * * * arising under the postal laws shall be brought in the name of the United States," 28 U. S. C. A. #732 (104).

Statutes of further importance not cited by petitioner are those found in 39 U. S. C. A. Sections 34 to 44, inclusive, and can be found in the foot note of Judge Nordbye's opinion (75-76). Also 5 U. S. C. A. Sec. 22.

E. REGULATIONS.

At page 9, under the heading "Regulations Violated by Postmaster" petitioner sets forth several sections of the Postal Regulations.

In view of this fact, and because peculiarly connected with the question involved, this defendant deems it necessary to set forth a quotation from the opinion of the Circuit Court of Appeals as follows:

> "The Postal Laws and Regulations, Edition of 1932, provide:
>
> "Section 777. 1. Mail Matter should be delivered to the person addressed or in accordance with his written order.
>
> "2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office.
>
> Section 816 provides for recovery of loss due to wrongful delivery from the postal employee responsible therefor by the Chief Inspector by proceedings in the department, and that,
>
> "7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear". (104).

The mail matter involved in this case was delivered pursuant to sub-section 2 of Section 777, which states that the postmaster may deliver mail matter to the person claiming the addressee has verbally given him authority to receive it unless he doubts the authority, in which case he may require written authority from the addressee.

The Circuit Court by the following language inferentially recognized that the postmaster in the absence of doubt might properly deliver mail matter on oral authority:

> "*If it be assumed* that the postmaster breached the bond by failing to require Hunting to file with him the written order of the addressee before delivering the letters in accordance with the provisions of section 777 of

> the Postal Regulations it does not follow that appellant is entitled to maintain the action" (104).

This was one of the questions raised throughout the trial and preserved by the Motions for Directed Verdict (61-63).

Further Judge Nordbye's opinion and decision indicates that no question was considered save and except the question of the coverage of the bond and of plaintiff's right to sue thereon. The Court said:

> "The Court is of the opinion, that if the right to sue on the bond existed, it would have jurisdiction, but a further discussion of the other grounds presented in the motion (fol. 133) becomes unnecessary in view of the conclusions indicated" (87).

In addition to the foregoing, various references are made in Judge Nordbye's order, to other provisions of the postal laws and regulations, and companion statutes (102-103).

F. Relation of Government to Bond.

The petitioner, at page 10 of its petition, under the heading, "Government's Relation to Bond" states that there is no contention on the part of the government, that any one other than petitioner, asserts any claim against the bond here involved, or that potential claims exist against it.

It is to be noted that this statement is not supported by any reference to the record to support this statement. In fact the record does not indicate any such fact. The record does indicate that petitioner sought permission from the United States to sue on the bond in the name of the United States, but this permission was denied by the Attorney General and no consent to this suit was ever given by the United States. (57-60).

Further the record indicates that the United States District Attorney filed a brief amicus curiae in support of the contention that petitioner had no right to bring this action on this bond. See: Opinion of Judge Nordbye (84).

ARGUMENT.

In his Brief, under the heading of "Argument" petitioner sets forth the following contentions:

1. The Circuit Court of Appeals has decided important questions of federal law which have not been, but which should be settled by this Court.
2. The Circuit Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court.
3. The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal on the same matter.
4. The decisions of the Circuit Court of Appeals is in conflict with its own decisions on the same matter, in cases cited below.

All of the petitioner's arguments (Petition pp. 19 to 36 inclusive) are fully answered in the defendant Surety Company's Brief herein. Any further discussion of them herein would be needless repetition, and the arguments as contained in said Brief are incorporated herein by reference the same as if fully set forth herein.

CONCLUSION.

It is unnecessary to point out the great importance of this case to this defendant. The right claimed by plaintiff strikes at every postmaster. It goes to the heart of the entire postal

system. If a postmaster can be held personally responsible for every consequential loss arising from an unintentional misdelivery of mail matter, no responsible person will assume the office or continue in it. If every postmaster can be subjected to the personal expense of litigation of this kind for damages as remote and speculative as those here asserted, there is no incentive to accept appointment or continue as postmaster. If a postmaster, sued as such for alleged misconduct in his office by a private citizen, cannot obtain the protection of the arm of the governmental service in which he operates and the services of the United States attorney in his defense, he is at a distinct disadvantage in that the action of his superior officers absolving him from the alleged misconduct can be ignored and their action excluded from consideration by either court or jury. In short, under the Postal Laws and Regulations the postmaster is prohibited from disclosing matters coming to his attention as postmaster (except on specific permission from his superiors) and yet, by reason of the same regulations, documentary or other proof necessary for his protection and defense is in the sole possession of his superiors in the Post Office Department. These factors should weigh heavily in any effort to find a "legal intendment" in the Postal Laws and Regulations permitting a suit of this kind.

Respectfully submitted,

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REPLY TO PETITION FOR CERTIORARI.

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INDEX.

Subject Index.

	Page.
Matter omitted from Petition	1
Argument	11
A. Important question of federal law	11
B. Conflicts with other decisions	15
(a) Conflicts with the decisions of this Court	15
(b) Conflicts with the decisions of other Circuit Courts of Appeal	23
(c) Conflict with other decisions of same Court	26
C. Rejoinder to the petition	28

Table of Cases.

	Page.
American Surety v. U. S., 133 Fed. 1019	24
Bosler v. U. S., 26 Fed. (2d) 4	26
Cox v. United States, 6 Peters 172	32
Crooks v. Harrelson, 282 U. S. 55	16
District of Columbia v. Fidelity & Deposit Co., 271 Fed. 383	32
Fosmire v. National Surety Co., 127 N. E. 472	34, 35
German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220	18, 32, 35
Gibson v. U. S., 208 Fed. 534	14, 24
Globe Newspaper Co. v. Walker, 210 U. S. 356	13
Howard v. U. S., 184 U. S. 676	17, 18, 20, 21, 22, 23
Howard v. United States, 102 Fed. 77	27, 28, 35
Massachusetts Bond & Ins. Co. v. U. S., 54 Fed. (2d) 1039	14, 24

Munroe v. Raphael, 288 U. S. 485 ..... 33, 34, 35
National Surety Co. v. U. S., 129 Fed. 70 ..... 14, 27
New Jersey Steam Navigation Co. v. Boston Bank, 6 How. 344 15
Robbins Dry Dock Co. v. Flint, 275 U. S. 303 18
Smith v. U. S., 170 U. S. 372 16
Teal v. Felton, 12 How. 284 16
Tullock v. Mulvane, 184 U. S. 497, 514 32
Union Pacific R. R. v. U. S., 219 Fed. 427 13
U. S. v. Abeel, 174 Fed. 12 25
U. S. v. American Surety Co., 163 Fed. 228 ..... 14, 24
U. S. v. Atlantic Coast Line R. R., 215 Fed. 56 .... 13, 14
U. S. v. U. S. F. & G. Co., 247 Fed. 16 ..... 13, 14, 24
U. S. F. & G. Co. v. U. S., 246 Fed. 433 ..... 14, 24
Washington v. Young, 10 Wheat. (23 U. S.) 406 .. 17, 18, 19, 20, 30, 31, 32, 35
Western Union Telegraph Co. v. Schriver, 141 Fed. 538 12
Williams v. Wells Fargo Express Co., 177 Fed. 352, 355 30

Opinions Cited.

Page.
23 opinions Attorney General 476 25

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REPLY TO PETITION FOR CERTIORARI.

I.

MATTER OMITTED FROM PETITION.

The question presented is, when stripped, one of construction of a bond. It is a Post Office bond covering a postmaster, and the meaning of its proper language is illuminated by the statutes and regulations pursuant to which it was written. Petitioner claims that a mail user, not a party to it, may sue upon it without the consent of the United States,

the obligee, for consequential damages claimed to have followed misdelivery of petitioner's mail.

The portions of the Petition for Certiorari captioned "Condition of Bonds", "Statutes Involved" and "Regulations Violated by Postmaster" respectively, significantly, omit portions of the bond in question, some of the statutes involved, and those Postal Regulations under which the Postmaster acted, and those other Regulations providing an ample remedy after the United States shall have sued upon the bond of which it is the sole obligee. Since each of these things was considered by the lower courts in arriving at the decision which the Petition assails, fairness to those courts impels their quotation here.

The bond is set forth on page 19 of the record. In addition to the condition quoted on page 8 of the Petition herein, it names an obligee. The trial court considered this important (Record, pp. 74, 77, 87), as did the Circuit Court of Appeals (R., pp. 103, 105). The bond names its obligee in the following language:

> "* * * we * * * Malone * * * as principal * * * and National Surety Corporation * * * as sureties * * * do hereby bind ourselves * * * *to pay to the United States of America* the sum of Sixteen Thousand Dollars ($16,000.00) * * *." (Italics ours.)

The statute which the Circuit Court of Appeals deemed "pertinent" (R. p. 104), and which is omitted from the Petition herein is 28 U. S. C. A., Section 732, and reads as follows:

> "All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing

of vessels, or the internal revenue, or direct taxes, and *all suits arising under the postal laws, shall be brought in the name of the United States.*" (Italics ours.)

The statutes, in addition to those mentioned in the Petition, from which the trial court deduced a congressional intent and policy adverse to petitioner's contention (R. pp. 75, 76), are quoted by that court in the footnote on pages 75 and 76 of the Record.

The Postal Regulation under which this postmaster acted, part of which is mentioned on page 10 of the Petition herein, is further quoted in the opinion of the Circuit Court of Appeals (R. p. 104). The trial court thought that this postmaster was convinced that the second paragraph of this Regulation covered this case and justified his conduct (R. p. 72). The significant parts of the Regulation in question are:

"Sec. 777. Mail matter should be delivered to the person addressed or in accordance with his written order. When the addressee habitually sends for or receives his mail through his clerk, servant, agent, or some member of his family, and recognizes or acquiesces in such delivery, no written order need be required.

2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. Ordinary letters bearing the word 'Personal' in connection with the address shall be delivered as other mail for the addressee is delivered.

* * *

4. When a postmaster is in doubt as to the identity of the addressee he may require proof, and shall exercise great care to make proper delivery, especially where mail matter appears to be of value."

The *Postal Regulations*, Section 816, were considered pertinent by the trial court (R. p. 80), and by the Circuit Court of Appeals (R. p. 104). That Regulation is not mentioned in the Petition herein. Its significance lies in assuming valid petitioner's claim that it is within the coverage of the bond in which it is not mentioned nor indicated. That assumption is contrary to the fact, as appears hereafter. But if the assumption be entertained, then this regulation defines petitioner's remedy.

> Sec. 816. The loss, rifling, damage, wrong delivery of, or depredation upon registered or other mail, and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.
>
> 2. When the Chief Inspector finds that the facts ascertained in connection with such an investigation establish the responsibility, by reason of fault or negligence, of a postal employee or mail contractor or an agent or employee thereof, the Chief Inspector shall demand the amount of the loss from such employee or contractor.
>
> * * *
>
> 6. If full recovery is not made and the Chief Inspector determines that further proceedings should be had, he shall present the facts to the Solicitor for the Post Office Department for advice as to the advisability of suit by the United States for recovery of the amount involved. Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.
>
> 7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear.
>
> 8. If the facts ascertained by the Chief Inspector establish an irregularity for which indemnity may be

payable and recovery can not be made without materially delaying the settlement of the indemnity claim, he shall transmit the papers to the officer charged with consideration of such claims for certification or rejection."

Related *Postal Regulations* provide remedies to the public by Departmental action that cover most of the usual cases of loss through the mishandling of the mails by carelessness or theft of postal employees. The interstices in the Regulations are filled in by Acts of Congress providing for Departmental action. These Regulations with their interpolated statutes were helpful to the Circuit Court of Appeals in its construction of the coverage of this bond (R. p. 106) and to the trial court (R. p. 80). Since they are not mentioned in the Petition herein, they are quoted in the footnote below.*

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*Title 5, U. S. C. A., as amended June 22, 1934. Sec. 392. **Adjustment and settlement of certain claims for damages to person or property by Postmaster General.** When any damage is done to person or property by or through the operation of the Post Office Department in any branch of its service and such damage is found by the Postmaster General upon investigation to be a proper charge against the United States, the Postmaster General is invested with power to adjust and settle any claim for such damage when his award for such damage in any case does not exceed $500, and this authority shall hereafter be construed as extending to cases caused by the negligence of any officer or employee of the Post Office Department or Postal Service acting within the scope of his employment. (Note—Last four lines beginning with words "and this authority"—was added by amendment of June 22, 1934.)

Title 31, U. S. C. A. Sec. 215. **Settlement of claims not exceeding $1,000; certification of amounts found due to Congress; time for presentation.** The head of each department and establishment acting on behalf of the Government of the United States may consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any

There are four suggestions of fact in the Petition that should be qualified if understanding is to be unclouded.

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claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor, together with a brief statement of the character of each claim, the amount claimed, and the amount allowed: **Provided**, That no claim shall be considered by a department or other independent establishment unless presented to it within one year from the date of the accrual of said claim.

Title 39, U. S. C. A.. Sec. 190. **Delivery of stolen money to owner.** Whenever the Postmaster General is satisfied that money or property stolen from the mail, or the proceeds thereof, has been received at the department, he may, upon satisfactory evidence as to the owner, deliver the same to him.

Postal Regulations, Sec. 59 * * *

2. The head of each department and establishment acting on behalf of the Government of the United States may consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor, together with a brief statement of the character of each claim, the amount claimed, and the amount allowed: **Provided**, That no claim shall be considered by a department or other independent establishment unless presented to it within one year from the date of the accrual of said claim.

3. Acceptance by any claimant of the amount determined under the provisions of these acts shall be deemed to be in full settlement of such claim against the Government of the United States.

4. (a) Postmasters shall investigate and report to the bureau of the department concerned all the facts concerning accidents of any kind involving instrumentalities of the Post Office Department with a recommendation as to the action that should be taken. If Government property was damaged through the fault of a private party, the postmaster shall collect the amount of such damage, if possible.

(b) Reports on accidents in which persons have been injured or private property has been damaged and reports on other accidents when the advisability of civil suit should be considered, shall be forwarded by the bureau of the department concerned to the Solicitor for review.

(c) The Solicitor shall determine whether or not responsibility rests upon the Government and compensation be allowable under the provi-

(a) The "Summary and Short Statement of the Matter Involved" in the Petition in its first paragraph (p. 2) refers to a "tortious misdelivery" of letters by the postmaster. If the epithet suggests the inference that this action is one in tort, then the petitioner is taking a new position, not suggested below. The case below was summarized by the Circuit Court of Appeals (R. p. 104). Although the Petition (pp. 6, 7) finds fault with some of the Circuit Court of Appeals' statements as to the facts, it finds no fault with this one:

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sions of paragraphs 1 or 2 of this section; but no claim shall be considered unless presented to the department within one year from the date of the accrual of said claim. The Solicitor shall recommend to the Postmaster General the payment of such claims as in his opinion should be paid pursuant to the provisions of paragraph 1 of this section, not exceeding in the aggregate the amount of the appropriation for this purpose. He shall also keep a record of the number of claims submitted, the number rejected, the number approved, the number paid, and the total amount thereof, and of the number approved but not paid because of lack of appropriation, if there be such, and the total amount thereof. He shall also consider and recommend to the Postmaster General the certification of such claims as in his opinion should be recommended for payment under the provisions of paragraph 2 of this section.

(d) When the Solicitor concludes that a civil suit is warranted he shall so advise the Chief Inspector. The Chief Inspector shall then prepare the request of the Postmaster General upon the Solicitor of the Treasury for such suit, and in case of recovery shall arrange for the proper disposition of the proceeds.

Postal Regulations, Sec. 233. All moneys received from mail robbers or other offenders against the postal laws, and moneys recovered by suit, or otherwise, on account of moneys taken from the mail or losses therein, shall be forwarded at once to the Chief Inspector, who shall deposit the same daily with the Superintendent, Division of Finance, office of the Third Assistant Postmaster General.

2. The Chief Inspector shall determine, upon satisfactory evidence, the proper persons or owners to whom the moneys shall be restored, and the Superintendent, Division of Finance, office of the Third Assistant Postmaster General, shall make payments in accordance with the schedule furnished and approved by the Chief Inspector, under the authorization of the Postmaster General.

"It will be observed that this is *not* an action against the postmaster *sounding in tort* * * *. It is an action on a bond by a stranger to the contract brought without the consent of the obligee." (Italics ours.)

(b) The Petition (pp. 6, 7) undertakes to correct the Circuit Court of Appeals' statement of fact that there was no claim below that the postmaster "had knowledge of the fraud that was being perpetrated" by the forger. The petitioner, to effect this correction, argues negatively from the possibility of a jury finding without citation to the evidence or to the court's instruction which define the verdict. Neither verdict nor evidence was for consideration either by the Circuit Court of Appeals or by the District Court upon the granted motion to dismiss from which the petitioner's appeal

3. When any money, either coin, currency, or negotiable paper, is received at the Post Office Department, a list shall be prepared by the bureau or office to which it pertains on Form 3033 in triplicate, the lists to be numbered consecutively through each fiscal year commencing with No. 1 on July 1 of each year, and transmitted with the funds to the Superintendent of the Division of Finance. The form shall show the name of the bureau or office, date funds were received, case number, name of remitter, purpose and fund to be credited whenever possible, and amount, except those from the office of the Chief Inspector, which shall have attached statements on Form 550 submitted by the inspectors in charge and shall show a summary of the classes of funds and the amount of each. The superintendent shall verify the amount received with the amount as shown on the schedule, sign the triplicate as the receipt to the bureau or office, and retain the original and duplicate. At the close of each month the superintendent shall total the original schedules by bureaus or offices and enter the amount on Form 3034 prepared in triplicate. The amount of uncollectible checks, if any, shall be entered in the space provided for that purpose on the form. This form properly filled out shall be sent to each bureau or office from which funds are received whether any funds were received during the month or not. Each bureau or office shall have the amounts as stated on Form 3034 verified with their records, and if the amounts agree the duplicate shall be retained and the original and triplicate signed and returned to the superintendent.

arose. The motion was made prior to the jury's retiring (R. p. 61), ruling on it was reserved (R. p. 63), it was renewed based on the complaint of the plaintiff (R. p. 65), and was then granted (R. p. 67). The motions had been made in another form prior to trial (R. p. 26) and at the beginning of trial (R. p. 48) and ruling by the trial court deferred (R. p. 53). It is therefore apparent that the suggested inferences from verdict are out of place, and are not made in order to aid consideration on the merits of the case.

Apart from that, in the absence of citation to the Record by petitioner the statement of the Circuit Court of Appeals should be taken as true. Moreover, the record (R. p. 16) shows that plaintiff's complaint fell far short of the explicit specification required to charge a purposeful fraud. It shows (R. p. 47) that upon trial petitioner refused, when challenged, to charge the postmaster with an intended fraud. All that petitioner now claims is that there *might* have been circumstantial evidence on which the jury *might* have found it. The instructions of the trial court to the jury do not appear in the Record, so we refrain from quoting them in refutation.

(c) The petition (p. 2) states that this is an action "to recover damages" sustained by misdelivery of the mail. The Circuit Court of Appeals (R. p. 102) correctly said it is an action "to recover *consequential* damages" resulting from a misdelivery. The distinction is important, because it is one difference between this case and the case of *Howard v. U. S.*, 184 U. S. 676. The *Howard* case is the substantial basis of plaintiff's petition for certiorari (Petition, p. 11). If it be distinguishable there is no conflict between this decision of the Circuit Court of Appeals and the decision of any other court in any other case. The point is,—that the petitioner is not suing for the intrinsic value of mail misde-

livered. It is suing for the losses it says a forger inflicted on it by taking advantage of the misdelivery (Complaint, R. p. 17). The Petition should in the interest of accuracy follow the example of the Circuit Court of Appeals and characterize the action as one for "consequential damages",—sustained through a dubious chain of alleged consequences.

(d) The Petition (pp. 10, 18, 25) asserts that no one else,—either the United States or another mail user,—has any claim against the bond here in suit. To support that repeated statement of fact, upon which argument is based (Petition, p. 25) the petitioner gives no citation to the Record. The purported supporting reference to page 84 of the Record does not sustain the claim. Since there is nothing whatever on the point in the Record we are also unable to give a citation. The fact is, nothing in the Record shows one way or the other whether the United States or others have, have had, or may have, claims against this bond which the petitioner seeks to exhaust for itself and by itself.

With these supplements to applicable statutes and regulations, and these qualifications of stated pertinent facts, the petitioner's statement may, for the purposes of this application only, be taken as true.

II.

ARGUMENT.

The rules mention several conditions of fact which may move this Court to grant certiorari. The petitioner detects and argues all of them (Petition, pp. 11-13). The occasions must be rare when a Circuit Court of Appeals, as well as a District Court, in a case of general law,—the construction of a contract,—are wrong on all possible grounds.

The writ is invoked on two general suggestions. They are that an important question of federal law remains undecided, and the conflict of this decision with other decisions of this Court and of other courts. The claimed conflict is not said to be direct, but is said to be a conflict between this decision and what petitioner conceives to be the implications or logical consequences of other decisions (Petition, pp. 11, 19, 26, 29). Thus the fact of conflict must depend as much on petitioner's logical processes as it does on any decision.

A. Important Question of Federal Law.

The Petition suggests that the importance of the question whether a private mail user may, without the consent of the obligee, the United States, sue on a postmaster's bond is obvious (Petition, p. 11). It has heretofore never been obvious to anyone else. The petition suggests that apart from what the petitioner conceives to be the analogous case of a different kind of Federal officer, there is no decision of any Federal Court upon the point (Petition, p. 11) and only the decisions of two State courts upon it,—both of them adverse to the petitioner. In the 150 years of operation of the Postal establishment, there must have been millions of instances of misdelivered mail. Some thousands of these in-

stances must have entailed some consequential loss to the sender. Yet never before has litigation like this ensued in any Federal Court. Nor, if petitioner's distinctions on pages 20 and 21 of his Petition be sound, in any court of the country. There has been no public interest in the question presented. The important question of Federal law that is said to cry for decision has never been invoked in the countless instances in 150 years in which it might have been. This shows that there is neither an important question of Federal law involved, nor any public interest in the point. It shows more. It shows that there is no right to sue such as the plaintiff claims. *Western Union Telegraph Co. v. Schriver*, 141 Fed. 538, Sanborn, J.:

> "The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists." (Syllabus, p. 539).

The reason for this apathy and absence of decision is that a complete remedy is provided those persons who may be so damaged by processes other than by suit. The Postal Regulations, Section 816 (above quoted, page 4) provide for suit by the United States through its proper officers upon the bonds of postmasters and for distribution of the proceeds of suit among the persons who have been hurt by the Postal employee's misconduct. Of course the claim of the United States, the obligee of the bond, is first satisfied. This process prevents exhaustion of the bond, to the exclusion of its obligee, the United States, and to the exclusion of all others, by the first casual adventurer who rushes in and usurps the name of the United States and seizes the fund. It leaves recoveries on bonds running to the United States for misconduct or fault of the employee within the control of the author-

ity which requires the bond and prescribes its amount and defines its conditions. This Regulation fits in with other Postal Regulations and Acts of Congress to "protect the public against the usual and normal losses that may occur on account of carelessness in the handling of the mails or otherwise" (R. p. 80, supra, p. 5-9). It provides remedies by administrative action within the Department and under its control. The fact that statutes fill in the interstices of the Regulations to make a consistent whole which provides remedies for every foreseeable case shows that Congress knew the Regulations the body of which it filled out by statute. By supplementing them it approved of them. This disposes of the suggested argument on page 26 of the Petition, to the effect that the Regulations are unauthorized by Act of Congress. These Regulations are not inconsistent with the Acts of Congress providing that postal bonds, such as here in suit, shall run to the United States (5 U. S. C. A., Sec. 377), and that all suits arising under the Postal laws shall be brought in the name of (i. e., by) the United States (28 U. S. C. A., Section 732). The remedy thus provided by Sec. 816 is the exclusive one.

U. S. v. U. S. F. & G. Co., 247 Fed. 16 (C. C. A. 6, 1918) (cited in Petition, p. 33).

Globe Newspaper Co. v. Walker, 210 U. S. 356.

Union Pacific R. R. v. U. S., 219 Fed. 427 (C. C. A. 8, 1915).

U. S. v. Atlantic Coast Line R. R., 215 Fed. 56 (C. C. A. 4, 1914) (cited in Petition, p. 31).

Consideration of these remedial regulations and statutes and the exclusive nature of the remedies they furnish within the Postal Department makes apparent the reason for the dearth of litigated cases on this point. The United States fre-

quently sued, and recovered, on postal bonds and distributed the proceeds of the suit by administrative processes (Regulations, Section 816) to the user of the mails who was damaged. Below are cited some such cases, all of them cited in the petition, pages 30-33:

U. S. v. American Surety Co., 163 Fed. 228 (C. C. A. 4).

Gibson v. U. S., 208 Fed. 534 (C. C. A. 1).

U. S. F. & G. Co. v. U. S., 246 Fed. 433 (C. C. A. 9).

U. S. v. Atlantic Coast Line R. R., 215 Fed. 56 (C. C. A. 4).

Massachusetts Bond & Ins. Co. v. U. S., 54 Fed. (2d) 1039 (C. C. A. 7).

U. S. v. U. S. F. & G Co., 247 Fed. 16 (C. C. A. 6).

National Surety Co. v. U. S., 129 Fed 70 (C. C. A. 8).

These regulations and statutes are the exclusive remedy for petitioner if he be assumed to be within the coverage of the bond. The cited cases are instances, selected by the petitioner himself, of many cases illustrating the zeal with which the Postal Department sues on bonds for the benefit of mail users, safeguarding first the rights of the obligee, the United States, in the bond that was made with it. This accounts for the absence of litigation on the point of which the Petition speaks (pp. 11, 19, 20, 22). The question of Federal law involved in this case is thus seen to be important only if Federal remedial statutes and regulations,—relied on by the courts below and omitted from the Petition,—are to be considered as nonexistent. The great public disinterest in the question presented is accounted for by the other ample and simple and costless remedy, which the petitioner disregards.

Of course the ascertainment of the coverage of this bond involves no question peculiarly federal or important, any

more than does ascertaining the coverage of any other official or statutory bond,— a sheriff's, a country treasurer's, a bank teller's, or a materialman's.

Of course if there be any good reason why users of the mail should be permitted to sue on postmasters' bonds, those reasons should be addressed to the Postmaster General or to the Congress,—who may fix the conditions of future bonds to permit such suits and who may fix future premiums. That is a better method than by appending to the thousands of existing bonds with private and corporate bondsmen a construction not dreamed of when the contracts were made,— not dreamed of either by the Postoffice Department (see Regulations 816) or by the Attorney General who caused to be filed a brief *amicus curiae* adverse to petitioner (R. pp. 53, 54), or by the postmaster who looked only to his Departmental superiors, or by the bondsmen.

B. Conflicts With Other Decisions.

(a) *Conflicts With the Decisions of this Court.*

It is claimed that this decision conflicts with the decisions of this Court (Petition, p. 12). The cases said to be in conflict we consider in order inverse to that of the Petition.

New Jersey Steam Navigation Co. v. Boston Merchants Bank, 6 How. 344, was a suit by a bailor against a third person upon a contract with the bailee relating to the bailed property. This is a suit on a bond given an obligee named by statute, brought by a stranger to the bond, not in privity with the obligee, and without the consent of the obligee. The recovery sought here is not bailed goods, but is consequential damages from the loss of letters of no intrinsic value. There is no conflict.

"*Smith v. U. S.*, 170 U. S. 372 * * * holds that fair protection of those dealing with a Government official should not be defeated through any 'refined reasoning'" (Petition, p. 12). The decision here in question holds that strangers to contracts made with the United States may not sue upon them without the consent of the United States. It holds that bonds given the United States may not be exhausted by bold adventurers. It holds that fair protection of those dealing with postmasters is afforded by administrative remedies which plaintiff has not pursued. There is no conflict.

"*Crooks v. Harrelson*, 282 U. S. 55 * * * holds that the letter of an Act of Congress is controlling unless a contrary intention is plainly manifested" (Petition, p. 12). The decision here in question holds that the letter of the Act of Congress naming the United States as obligee of the bond (5 U. S. C. A., Section 377) and that the letter of the Act of Congress requiring the United States alone to sue in all cases arising under the Postal laws (*28 U. S. C. A., Section 732*) and that the letter of the statutory bond, "to pay to the United States of America" (R. p. 19) are controlling, and exclude this petitioner. The petitioner points to no contrary manifestation in any statute, regulation or language of the bond. There is no conflict.

"*Teal v. Felton*, 12 How. 284 * * * holds that a postmaster's wrongful withholding of mail matter from the addressee is a conversion for which the addressee can sue the postmaster" (Petition, p. 12). The suit here in question is not by the addressee, it is by the sender. It is not for a conversion of the property in a letter, but for consequential damages arising from misdelivery. It is not, as here presented, against the postmaster, but against a surety to the

United States and without consent of the United States on a bond to which petitioner is a stranger. There is no conflict.

"*Howard v. U. S.*, 184 U. S. 676 * * * holds that an official bond of a Federal Court clerk, given under a * * * statute * * * could be sued on by a private person in the name of the United States, although the United States was the only obligee named in the bond" (Petition, p. 12, argumentative parts omitted). Petitioner's case depends on this *Howard* case (Petition, pp. 11, 23, 29, 34). If the statutes requiring bonds, and the bonds, of Federal Circuit Court clerks be different from the statutes and regulations prescribing bonds of postmasters, and prescribing suits on them and remedies under them, or if the bonds be different, then plaintiff's case is gone (Petition, p. 11). The Circuit Court of Appeals (R. p. 105-6) and the trial court (R. pp. 77-80) thought the cases very different. Their distinctions of that case from this one are adequate. We shall, however, draw attention to the facts of the *Howard* case in some detail and to its more flagrant differences from this one.

A preliminary reminder of the state of the law will make the holding of the *Howard* case clear. As to official bonds,—"No person who is not the obligee of a bond or its assignee can put it in suit unless authorized to do so by the legislature. It is not enough that a breach of the bond has damnified the person who brings the suit. * * * No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent, given in fact, or by legal intendment." (Marshall, C. J., in *Washington v. Young*, 10 Wheat. (23 U. S.) 406). Although third persons to such

bonds "may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names (citing cases) * * * every citizen * * * is interested in the faithful performance of contracts of service by policemen, firemen and *mail contractors* * * *. But for the breaches of their contracts *the citizen cannot sue,—though he suffer loss because the carrier delayed in hauling the mail,* or the policeman failed to walk his beat * * * "(*German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220). (Italics ours.)

"Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must at least show that it was intended for his direct benefit" (Holmes, J., quoting, in *Robbins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303).

This being the law, it will be borne in mind that in the *Howard* case the search of the court was for a "legal intendment" (in the language of the *Young* case), apparent from the statutes and their circumstances, that private persons might sue on that bond of that clerk in the name of the United States.

In the *Howard* case (184 U. S. 676) the bond covered a clerk of the Circuit Court of the United States who had embezzled money paid into court by a litigant, pursuant to order of the Court. The bond named the United States as obligee. It was given pursuant to a statute that required the Court to fix its amount, to designate its place of deposit, and to supplant it when that seemed desirable. The statutory condition of the bond was that the clerk would faithfully

discharge the duties of his office and "seasonably to record the decrees, judgments and determinations of the court of which he is clerk". Suit was brought on the bond by the person whose payment into court the clerk had embezzled after that person had received leave of that court to sue upon it (p. 679). The Supreme Court reviewed in detail the statute requiring such bond of the clerk. It pointed out, as did the opinion below in that case, that since the great mass of the litigation in the Circuit Court was between private litigants, the Government cases being usually in the District Court, there was very little interest of the Government to protect by bond. (93 Fed. 719, 721.) It then pointed out that the condition of the bond seasonably to record the decrees must be taken as referring to the private litigants who were the majority in that court and without other security. The Court then considered that the bond was for the protection of all suitors and that the statutory provision for an increase in the amount of the bond was for the protection of private as well as public suitors. The Court pointed out that a contrary reading of the statute and of the bond would leave private suitors in the Federal Court without any provision *whatever* for their security. The Court then distinguished the *Young* case, above quoted, affirming it to be sound law, and pointed out that in that case the primary purpose of the bond was the protection of the public as the obligee. The Court said that the Circuit Court with whom the bond was deposited must be regarded as trustee of it for any party injured. The Court then held that a private litigant, whose money was so embezzled might sue upon the bond because "such must be held to be the legal intendment of *existing statutory provisions*" (Italics ours). In respect of the argument that bonds other than those of clerks of Federal Courts expressly provide for suit by private persons, it said:

"We are of opinion that this argument, though not without force, ought not to prevail against the legal intendment of *the statutory provisions* relating to clerks, who hold a *peculiar relation* to the courts appointing them, as well as to the public." (Italics ours.)

It is notable (a) that the Supreme Court in distinguishing the *Young* case looked to the primary purpose of the bonds in each case, as did the Circuit Court of Appeals here, and (b) that the Supreme Court looked for legal intendments of coverage only in applicable "statutory provisions". The only immediately applicable "statutory provisions" here require the bond to be made "to and with the United States" and suit only "in the name of the United States". The only collaterally applicable "statutory provisions" leave the liabilities of the bond completely within control of the United States (Record, pp. 75 and 76).

Another striking distinction between the *Howard* case and the case at bar is this: In the *Howard* case the court found, in the language of the bond, and in a search of the statutes, and in the circumstances of the bond, a legal intendment from "statutory provisions" that that plaintiff might recover on the bond. In the case at bar the petitioner has not referred to any language of the bond, to any statute, to any regulation, or to any circumstance which indicates that the bond was intended for the benefit of anyone other than the United States, its statutory obligee. The cases cannot be considered in conflict unless they be analogous. They cannot be considered analogous unless some elements of the analogue be pointed out. No such element is mentioned or can be.

In the *Howard case the* Circuit Court was the depositary of the bond, authorized to prescribe its amount and, as the

Supreme Court said, was the "trustee" of it. It was, in effect, the obligee. It gave its consent to the plaintiff's suit. In the case at bar the United States was the obligee. Not only was its consent refused to plaintiff (R. p. 59), but the United States filed a brief *amicus curiae* in support of the position that the plaintiff has no right to bring this action on this bond (R. pp. 54, 84).

In the *Howard* case the reference in the bond to the decrees that were to be faithfully recorded must obviously have been decrees of private litigants, since the great mass of litigation in that Court is private, and not that of the United States. There is no reference to any duty to any private person in the statute or bond in the case at bar. In the case at bar the condition of the bond is that the postmaster will faithfully discharge all duties and trusts imposed upon him and "that he shall perform all *duties as fiscal agent of the Government* imposed upon him", and "shall also perform *all duties* * * * imposed upon * * * him * * * in connection with the *Postal Savings System*". The obvious purpose of this condition is to protect a primary interest of the Government. If it were intended to be read as petitioner claims, then the last two of its three conditions would be unnecessary. If plaintiff's contention is correct, the condition that the postmaster will perform all duties imposed by law or regulation is sufficient and the specified particular duties to the United States are surplusage. The specifications of the performance of duties as fiscal agent and in connection with the Postal Savings System show that the purpose was the protection of the United States, the named obligee.

In the *Howard* case it was pointed out that there is no provision in any statute pertaining to the bond inconsistent

with a direct duty to the private litigant. In the case at bar, the statutory provisions (Title 39, USCA, Sec. 35, 36, 37, 38, 44, Record, pp. 75, 76), relating to the application of payments made by sureties upon debts to the Government, and to the period of liability on bonds, and to the safe-keeping of the public property at the postoffice, are inconsistent with a private coverage. The statutory provisions release the surety after three years by nonaction of the Postmaster General without reference to claims of others (Title 39 USCA, Sec. 40, Record, pp. 75, 76). These are all inconsistent with any duty to the private user of the mails in respect to the bond. In the *Howard* case it was forcefully pointed out that apart from this bond private litigants have no security whatever. In the case at bar, it is abundantly apparent from Sec. 816 of the Postal Regulations that the private user of the mails has ample protection under this bond, even if it be assumed to be for his benefit, by pursuing his administrative remedy. The language of the *Howard* case referring to the "peculiar relations" of the Clerk of the Court to private litigants means that that case was not intended to be taken as precedent in the cases of other officers. Each such case must stand upon its own facts and statutes. The petitioner, neither in the Petition nor at any time below, has pointed to any statute, or regulation, or other circumstance which would in any like way in this case show legal intendment that private persons might sue upon it.

In the *Howard* case a legal intendment was found as respects the private litigant whose money was embezzled. In the case at bar there is the very practical difference that the postmaster is necessarily unaware of the contents of the mail that he handles. The clerk of court knew that he had money that he held and that was not his. The postmaster is

sued here on his bond, not for the value of what he handled but for consequences arising by reason of other circumstances out of a misdelivery of it. The legal intendment in such a case would necessarily have to be much clearer than in the *Howard* case. Here the recovery sought is not that of any *tangible* property. To hold a postmaster to the same measure of liability as the clerk in the *Howard* case, who received money, is to extend the "peculiar relation" spelled out by the court from the statutes in the *Howard* case far beyond the narrow limits there expressed.

(b) *Conflicts with the decisions of other Circuit Courts of Appeal.*

The Petition suggests that this decision conflicts with seven decisions of other Circuit Courts of Appeal and with one opinion of an attorney general. These cases and opinion are cited at the top of page 13 of the Petition. In each of the cases cited there was a bond in which the United States was obligee; in each of those cases the United States sued upon that bond. In the case at bar the United States is not suing, but is taking a position adverse to the plaintiff. No one has ever suggested that the United States might not sue upon this bond, and perhaps it will. Cases where the obligee of the bond sued upon it are not in point here. There is no conflict between the decision in this case, which holds that a stranger to a bond may not sue upon it, and the decisions cited in other Circuit Courts of Appeal, which hold that the obligee may sue.

Of the seven cases from other Circuit Courts of Appeal cited as establishing a conflict with the decision in this case the following were suits upon postal bonds brought by the

United States, which in each instance was the obligee of the bond:

United States v. American Surety Co., 163 Fed. 228;
Gibson v. United States, 208 Fed. 534;
United States F. & G. Co. v. United States, 246 Fed. 433;
Massachusetts Bonding & Ins. Co. v. United States, 54 Fed. (2d) 1039;
United States v. United States F. & G. Co., 247 Fed. 16;
American Surety Co. v. United States, 133 Fed. 1019.

In those cases where the United States, as distinguished from the mail users, sued upon the bond it was held that the United States might recover not only its own proper loss but the loss of the private user of the mails, and that the United States was under a moral obligation to pay over to that private user such loss as it had recovered on account of him. Sec. 816 of the Postal Regulations is a recognition of this moral obligation of the United States to pay over to persons damnified by postal errors such recovery as the United States might make on their account. That section, above quoted page 4, provides the machinery by which the United States carries out the doctrine of these cases cited by the petitioner. As appears from the quotation from *United States v. United States F. & G. Co.*, on page 33 of the Petition, this right of recovery of the United States is based upon its unique relationship to the bond and to the public which uses the postoffices. It is in its function as *parens patriae* that it sues upon the bond, and distributes according to Sec. 816 of the Postal Regulations the proceeds of the bond among the various claimants in the proportion to which they are entitled and as far as the funds allow. In each case the court speaks of a *moral* obligation of the

United States to pay proceeds of the bonds to the mail user. This is an affirmation that there is no *legal* right in the private mail user—that is, that the private mail is not within the coverage of the bond. There can be no conflict between these cases, in which the named obligee of the bond, the United States, sued, and the case at bar, in which it is held that one who is not the obligee may not sue.

The remaining case cited by the Petition from another circuit as in conflict with the decision in the case at bar is *United States v. Abeel*, (C. C. A. 5) 174 Fed. 12. That was the case of a bond of a clerk of the federal court. The obligee named was the United States. The United States sued upon the bond. It appears from the statement of the case on pages 32 and 33 of the Petition and from the foregoing that there is no conflict between that case, where the obligee of the bond—the United States—sued upon it, and the case at bar, in which it was held that one not the obligee of the bond might not sue without the consent of the obligee.

The remaining reference to establish a conflict between the decision in the case at bar with those of other circuits is the citation of 23 *Opinions, Attorney General*, 476, 479 (Petition, p. 33). A conflict of a decision of a Circuit Court of Appeals with a prior opinion of some attorney general is not a ground for issuance of the writ of certiorari. We have not available the opinions of the attorneys general and it is not clear to us from the quotation from the opinion in the Petition (pp. 33, 34) what kind of a bond the Attorney General giving the opinion was referring to, nor the conditions of the bond. Apparently the petitioner in quoting from the opinion was itself in doubt concerning the nature of that bond and its conditions ("*seems* to have had under consideration the bond of a postal employe *resembling* in its conditions the

bond at bar", Petition, p. 33). There is nothing in the quoted portion of the opinion to indicate that one not the obligee in the bond or the proprietor of the obligation may put it in suit without the consent of the obligee. Whatever the effect of that opinion may be, it is entirely dissipated by the fact that in the case at bar the Attorney General caused a District Attorney of the United States to file a brief as *amicus curiae* adverse to the contention of the plaintiff and petitibner. If there were anything in the opinion of the Attorney General cited by the petitioner that may be taken as supporting his case, it must be presumed to have been, upon more mature consideration, revoked by the brief filed as *amicus curiae* by the United States in this case (R. p. 84).

(c) *Conflict with other decisions of same Court.*

It is suggested in the Petition on pages 13 and 34 and 35 that the decision of the Eighth Circuit Court of Appeals in this case conflicts with other decisions of the same court. Three cases are cited by petitioner as establishing this conflict. They are considered below.

The first of the cases is *Bosler v. United States*, 26 Fed. (2d) 4. That was an action upon a bond given a depository in bankruptcy pursuant to the statute quoted on page 7 of that opinion. The bond ran to the United States. The further statute quoted on the page (Title 11 USCA, Sec. 78, subsection H) provided:

> "Bonds of * * * designated depositories * * * may be sued upon in the name of the United States for the use of any person injured by a breach of the conditions."

The suit in question was brought by the United States pursuant to the statute. The opinion on page 7 shows that the

suit was brought for the use of numerous persons injured by a breach of the bond. The court quite properly held that the United States, the obligee of the bond, thereto expressly authorized by the statute mentioned, might maintain a suit upon the bond. There can be no conflict between the decision in that case and the decision in the case at bar. The decision in the case at bar is that a stranger to the bond, of which the United States is the obligee, may not, without the consent of the United States, sue upon that bond in the absence of any statute creating a legal intendment that he shall be permitted to do so. Again, the absence of reference by the petitioner to any fact, circumstance, statute, or regulation carrying any remote inference of intention that a private person may sue upon this bond is significant.

The second of the cases cited by the petitioner as establishing this conflict is *Howard v. United States,* 102 Fed. 77. This is the same *Howard* case that was above discussed. The citation is to the decision of the Circuit Court affirmed in 184 U. S. 676. The distinction between that case and the case at bar is above discussed (supra, p. 17-22) and is carefully pointed out by the trial court on pages 77 to 80 of the Record. The distinction is further pointed out by the very Circuit Court of Appeals mentioned on page 105-6 of the Record.

The third case depended upon by the petitioner to establish this conflict is *National Surety Co. vs. United States,* 129 Fed. 70. That was a suit upon the bond of a letter carrier, which bond was given to the United States as obligee. The letter carrier rifled the mail of registered letters for which the United States was liable over in small amounts to the owner. The decision held that the United States might sue upon the bond for the value of the matter stolen above

the amount of its liability over to the mail user. This again is an example of a suit by the United States as obligee of a bond for distribution of its proceeds pursuant to Sec. 816 of the Regulations. By that regulation the United States sues upon the bond and pays over the loss that the mail user may establish, which does not exhaust the bond to the prejudice of the United States or other damnified users of the mail. There is no conflict between the decision in that case, which holds that the United States, the obligee of the bond, may sue upon it, and the decision in the case at bar, which holds that a stranger to the bond may not sue upon it without the consent of the obligee, the United States.

C. Rejoinder to the Petition.

The petitioner points to no statute or regulation affording ground for the inference that there was a legislative intendment that he might sue upon this bond which the congress required to run to the United States.

He merely attempts to expand into a general principle the narrow comparisons of numerous statutes and circumstances which the *Howard* case described as creating a "peculiar relation". He then suggests that a decision in this case could be so framed as to avoid its being regarded as a precedent (Petition, p. 25). The *Howard* case was so framed.

Herein-below are mentioned briefly five considerations with their corollaries which establish that no legislative intendment existed here to permit such a suit.

There are also briefly mentioned four cases with their corollaries, which, if there be virtue in analogy, establish the soundness of the decision assailed. They make it clear that this decision is but one of many repeated applications of a well known principle of general law.

The Act of Congress requires that a bond be made to and with the United States (supra, p. 13). This express provision as a separate section of the statutes indicates that the Congress intended that the United States should have complete control of this bond.

The Act of Congress requires that suits under the Postal Laws as well as suits for duties, imposts and other such matters shall be brought in the name of the United States. The language covers this case. It evinces an intention that the responsible officers of government shall be in the control of the litigation of all such cases. It cannot be said that that intention is discharged when, against the will and without the consent of the United States, a private corporation takes the name of the United States. The intention of that statute is that funds so recovered shall be paid into the United States Treasury and thence by the United States disbursed in such manner as it determines. It was said with reference to this very statute in the case of *The Stella B*, 183 Fed. 507, 512:

> "But a general penalty provided by a law of Congress and not particularly specifying that the penalty shall go to somebody else must carry with it the payment of the penalty into the treasury of the United States. Its subsequent disposal or whether someone may be entitled thereto at the hands of the United States cannot affect the form of action under which the penalty should be sought to be recovered."

No distinction may be drawn between the language of that statute respecting the recovery of penalties and that respecting suits arising under the Postal Laws. If this suit may be maintained in this form, any private individual may usurp the name of the United States and bring suits for duties or imports or penalties. A private individual may not sue un-

der this statute for the benefit of himself and of United States. *Williams v. Wells Fargo Express Co.*, 177 Fed. 352, 355. If a private person may avoid the effect of this statute by taking the name of the United States without its consent and designating it as plaintiff to be bound by a judgment, simply on the theory that he is, as a member of the public, the beneficiary of some statute, then he may do so in any case where the United States may sue, e. g., *quo warranto*.

Sec. 816 of the Postal Regulations furnishes an ample and complete remedy to mail users who are within the intendments of postal bonds. It has been repeatedly pursued and suits have been brought under it in many instances by the United States for their benefit. The cases cited in the Petition show this. It is consistent with the purpose of the foregoing statute that all such suits shall be within the control of the Government and of its responsible officers, who shall determine their bringing and their disposition. To provide otherwise would establish a double rule of conduct for the employees of the Government. One rule would be that established by their superiors and the determination of responsible officers in particular cases of alleged misconduct. The other rule would be that made in different cases by a common law jury, ill-informed as to the necessities of administration, the applicable regulations, and the practices of the Department in question.

In its failure to express an intendment that persons such as the plaintiff might sue upon this bond, it must be taken that the Congress had in mind that Sec. 816 of the Regulations will prevent exhaustion of the bond to the detriment of the Government and its claims, and to the detriment of other users of the mail. In the language of *Washington vs. Young*, 10 Wheat. (23 U. S.) 406,

"It should not be in the power of the first bold adventurer who should seize and sue upon it to appropriate it to its own use and to force the obligees to appear in court as plaintiffs against their own will."

No Congress having in mind the necessities of administration of a far flung postal department would extend the liability of postmasters to that here claimed by the petitioner. The postmaster is without knowledge of the contents or purpose of letters received at the postoffice, whether they be addressed to a person known or unknown to him. He is not in the same position as a man who receives delivery of property the nature and character of which is apparent at delivery, and is in no way concealed or held from his scrutiny. The postmaster has no way of knowing that there are possible damages resulting from his negligence or failure properly to deliver the letter. They are not only beyond the bounds of foresight but beyond those of imagination. A mislaying of a circular advertisement may provoke a suit for the loss of a sale. Just as here, where it is claimed that the erroneous delivery of circular inquiries addressed to strangers by the sender enabled a forger to seize his opportunity, so any letter of the millions handled daily might entail enormous and incalculable consequential damages. It is perfectly obvious why the Congress expressed no intention that such persons as the plaintiff might sue such postmasters, either personally or upon such bonds,—but on the contrary, required such bonds to be to, and such suits to be by, the United States.

The case of *Washington v. Young* has been above mentioned and is still law. This bond must be read as if made in the City of Washington and is subject to the common

law of the District of Columbia. *Tullock v. Mulvane*, 184 U. S. 497, 514; *Cox v. United States*, 6 Peters 172:

> "The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the City of Washington, and the liability of the parties must be governed by the rules of the common law."

The *Young* case above cited is still the law in the District of Columbia. *District of Columbia to the use of Langellotti v. Fidelity & Deposit Co. of Maryland* (Ct. App., Dist. of Columbia, 1921), 271 Fed. 383.

It will be noted that the *Young* case holds that no one other than the obligee may sue upon a bond unless the right be given by the legislature. The reference to "legal intendment" is to using the name of another without assent. So here, while the Congress has provided in numerous cases that private persons may sue upon a bond running to the United States—such as materialmen under public contract, bonds of bankruptcy trustees, bankruptcy receivers, bankruptcy depositaries, bonds of United States marshals, cartage contractors, and of consular officers, and of many other persons—the absence of such provision entailing such consequence in this case is of decisive weight.

The case of *German Alliance Ins. Co. v. Home Owners Supply Co.*, 226 U. S. 220, illustrates the reason for the rule that only parties to a contract may sue upon it and the impossibility of any man knowing his liability were the rule otherwise. There a subrogated fire insurance company sued a water company for its failure to perform a contract with a city to furnish ample water for use in fires. This Court denied recovery and pointed out that even in those jurisdictions where the right to sue on contracts of others is most

liberally granted such a suit cannot be maintained unless it be shown that the contract in question was intended for the *direct* benefit of the plaintiff. To illustrate the unbounded nature of liability were the rule to be otherwise, the Court used as an illustration, which it apparently considered too clear for argument, the very case at bar. It said that the citizen may not sue a mail contractor for a breach of his contract though the citizen suffer loss because the carrier delayed in carrying the mail. That illustration is this case.

Munroe v. Raphael, 288 U. S. 485, is another illustration of the fact that the *Young* case is still the law of this Court. In that case a receiver appointed by the United States District Court sold certain property to a purchaser who agreed to pay a certain percentage of all allowed claims. The purchaser gave a bond running to the United States for the performance of the purchase agreement. The plaintiff by leave of the court sued the surety on the bond in the state court in the name of the United States on his own relation. The District Court revoked its permission to so sue. The Circuit Court of Appeals reversed the action of the District Court. The Supreme Court reversed the Circuit Court of Appeals and re-established the revocation of the District Court, saying:

> "In parting with the property the receiver, as the court's representative, took a bond, running not to the creditors, but to the United States. Certainly no creditor could bring a suit in his own name on the bond for his share of the purchase money."

That bond was much more obviously for the direct benefit of designated third persons than can be claimed for the bond in the case at bar, which specifically covers the postmaster's

duties as fiscal agent of the Government. If there be virtue in analogy or precedent, *Munroe v. Raphael* disposes of the plaintiff's case.

That the question presented is one merely of general law and not of peculiarly federal law which might sanction the issuance of a writ of certiorari is illustrated by the case of *Fosmire v. National Surety Company*, 127 N. E. 472 (N. Y. 1920). That was a bond given by a highway contractor under the New York Highway Law, conditioned for performance and completion of a contract within a prescribed time and for the protection of the state against excess costs and for the payment of wages to laborers. A laborer sued upon it for unpaid wages due himself and his fellows. It will be noted that his position with respect to the bond is much stronger than is the case of the plaintiff at bar, who is not mentioned in the bond or in the statute requiring it. The court held that he might not sue upon the bond since he was not within its statutory intendment. Cardozo, J. in the opinion said:

> "We think the cause of action is in favor of the people solely (citing cases). In so holding we put our decision upon the single ground that the bond, read in its entirety, is inconsistent with the intention that the plaintiff and others in like position should have the right to sue upon it. If that intention is absent, the right to sue will be denied."

So, here, the statutes requiring the obligee to be the United States, putting the right of suit in the United States, placing in the Postmaster General the right to fix the amount of the bond, to supplant it, to change it, and to discharge liability under it, together with other and ample provision for the protection of the users of the mails, are inconsistent with the

right of the plaintiff to sue without the consent of the United States. So are the provisions of the bond protecting the United States against misconduct of its "fiscal agent" and the custodian of its Postal Savings money.

Unless the *Howard* case is to be extended beyond its "peculiar relation," the plaintiff has no case. Even if it be so extended, the provisions of the statute limiting the jurisdiction of the District Court in suits arising under the postal laws must still be met, and the effect of statutory sanction of provided administrative remedies making them the exclusive remedy, must still be met. The petition concedes that apart from the inferential application of the *Howard* case there is no other federal decision upon the point. There therefore can be no conflict between decisions.

The question is one of general law distinguished from a question of law peculiarly federal. This is shown by the *Fosmire*, the *Young*, the *German Alliance*, and the *Munroe* cases, all of which refer in their respective constructions of obligations to the well known rules of general law.

No ground, therefore, appears for the issuance of the writ.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, a Corporation,

Petitioner,

vs.

NATIONAL SURETY CORPORATION, a Corporation, and PATRICK J. MALONE,

Respondents.

BRIEF FOR RESPONDENT MALONE.

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TABLE OF CONTENTS.

	Page
PROCEDURAL HISTORY OF CASE	1
STATEMENT OF FACTS	3
ARGUMENT	14
I. Plaintiff Has No Right to Sue on this Bond, in the Absence of Such Right to Sue Being Conferred by Statute, Either Expressly or by Necessary Legal Implication	14
A. At Common Law, Plaintiff, as a Stranger to the Contract, Would Have No Right to Sue on this Bond	14
B. The Language of the Bond Statute and Related Statutes Does Not Expressly Confer a Right in Plaintiff to Sue on this Bond	15
C. The Language of the Bond confers No Right in Plaintiff to Sue thereon	16
D. The Language of the Bond Statutes, and Related Statutes, does not by Necessary Implication or Legal Intendment Confer on Plaintiff or any other Private Person a Right to Sue on this Bond	17
The *Howard Case* Considered and Analyzed	22
The Letter of the Bond Statute Negatives a Right to Sue in Plaintiff	28
Plaintiff Seeks Judicial Legislation	30

The Fact that the Bond is to be Made to and With the United States is an Important Factor in Determining Legal Intendment 30
The Bond Does Not Cover Both the Government and Mail Users 31
Departmental Regulations Confirm the Intendment Expressed in the Statute that Plaintiff Has No Right to Sue 32
The Spirit of the Law Negatives a Right to Sue in the Plaintiff 33
Absence of Any Express Legislative Intent, or that Arising by Implication, and Absence of Consent of the United States Conferring a Right to Sue on the Bond, Preclude Plaintiff from Maintaining this Action 36

II. The Doctrine by Which the United States Sues as Bailee to Recover Loss Sustained by Private Persons, Together With the Postal Regulations, Provides the Exclusive Remedy for Losses Suffered by Private Persons 39
The Rule that the Government, as a Bailee, Can Recover On Similar Bonds for Theft of Registered Letters and the Like, Is Not in Conflict With the Circuit Court's Opinion that Plaintiff Has No Right to Sue on the Bond 42
The Question of the Postmaster's Liability in Tort is Not Before this Court 43

CASES CITED.

Page.

Brewster v. Gage, 280 U. S. 327 41
Clark v. U. S., 60 Ga. 156 39
Fosmire v. National Surety Co., 229 N. Y. 44, 127 N. E. 472 ..... 14, 39
German-Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220 ..... 14, 37
Gibson v. U. S. (1st Cir.) 208 Fed. 534 43
Globe Newspaper Co. v. Walker, 210 U. S. 356 41
Helvering v. Winmill, 305 U. S. 82, 83 41
Idaho Gold Reduction Co. v. Crohgna, 62 Idaho 467, 56 Pac. 163 38
National Surety Co. v. U. S. (8th Cir.) 129 Fed. 70 ... 43
Public Clearing House v. Coyne, 194 U. S. 497, 506 ... 33
Robins Dry Dock etc. Co. v. Flint et al., 275 U. S. 303 ..... 14, 39
U. S. v. American Surety Co. (C. C. Ill.) 155 Fed. 941 43
U. S. v. American Surety Co. (4th Cir.) 163 Fed. 228 .. 43
U. S. Fidelity & Guaranty Co. v. U. S. (9th Cir.) 246 Fed. 433 43
United States v. Griswold, 76 Pac. 696, 8 Ariz. 453 39
United States v. Howard, 184 U. S. 676 ..... 22-26, 30, 36
United States v. United States Lines Co., 24 Fed. Supp. 427 ..... 11, 39
U. S. A. for the Use and Benefit of Midland Loan Finance Company v. National Surety Corporation, 23 Fed. Supp. 411 25-28

Washington v. Young, 10 Wheat. (23 U. S.) 406 ..14, 21, 36
Wile v. U. S. Fidelity & Guaranty Co., 6 Alaska 48 ... 38

STATUTES CITED.

Page

5 U. S. C. A. s. 22 7
5 U. S. C. A. s. 377 .....5, 18, 19
5 U. S. C. A. s. 392 .....7, 40
28 U. S. C. A. s. 732 .....5, 11, 18
31 U. S. C. A. s. 215 40
39 U. S. C. A. s. 34 .....5, 15
39 U. S. C. A. s. 790 .....8, 40

OTHER AUTHORITIES CITED.

Postal Laws and Regulations of 1932, ss. 59, 233, 777, 816.....8, 9, 10, 32, 40, 45, 46, 50

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BRIEF FOR RESPONDENT MALONE.

PROCEDURAL HISTORY OF CASE.

This action is before this Court on Certiorari, for review of the decision of the Circuit Court of Appeals of the Eighth Circuit Court [103 Federal Reporter (2nd), 450], which affirmed the judgment of the United States District Court, District of Minnesota, entered June 14, 1939, dismissing plaintiff's complaint [23 Federal Supplement 411]. (101-115; 68-91)*

*NOTE: In this brief for purposes of convenience Petitioner will be referred to as plaintiff and Respondents will be referred to as defendants. Unless otherwise indicated, the figures in the parentheses refer to pages of the printed record.

This action was commenced by plaintiff, Midland Loan Finance Company, in the name of the United States, to recover consequential damages against the principal and surety on an acting postmaster's bond (3-24). Both defendants interposed Demurrers to the complaint, which were overruled (25-30). Both defendants interposed Answers, which Answers, together with amendments at trial, among other things challenged the right of plaintiff to maintain this action on the bond (30-34). At the trial, after plaintiff's opening statement, again at the close of plaintiff's testimony, and finally at the close of all testimony, motions to dismiss were made by defendants on the grounds, among others, that plaintiff had no right to sue on this bond, and that there was no evidence of consent of the United States authorizing such suit (61, 67, 75-77). The Court granted the motion of defendant Surety Company to dismiss, on the grounds that the United States was the sole party in interest entitled to sue or recover on the bond, and that plaintiff, not having obtained the Government's consent to do so, could not maintain this action in the name of the United States (102). The Court likewise dismissed the action against defendant Malone, the principal on the bond, since in the absence of the surety as a party the requisite diversity of citizenship to confer jurisdiction was lacking (88).

The motions to dismiss were made at the close of the testimony and before verdict, the Court reserving its ruling thereon until after verdict. This procedure was consented to by counsel for all parties (70).

Though the Trial Court's decision was made after verdict, it must be considered to have been made at the time

of the motions, that is *nunc pro tunc*. Thus, the verdict, or its effect, is not before this Court on this appeal.

STATEMENT OF FACTS.

Facts Stated by Circuit Court of Appeals.

The statement of facts set forth by the Circuit Court of Appeals is correct, and incorporated herein by reference (102-103).

Plaintiff criticizes the statement of that Court that it is not claimed that the postmaster "had any knowledge of the fraud that was being perpetrated by Hunting," and claims that the same should be qualified by stating that the testimony did not directly "establish that Malone was knowingly a party to the fraud."

The language of the Circuit Court of Appeals in this respect is as follows:

> "It is not claimed that any of the lost funds came into the posession of the acting postmaster, or that he had any knowledge of the fraud that was being perpetrated by Hunting." (103).

The record indicates this statement of the Circuit Court of Appeals is correct.

The opinion, in part, of Judge Nordbye, reads as follows:

> "The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not directly establish that Malone was knowingly a party to the fraud. Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to convince Malone that it was perfectly proper for the 'Midland mail' to

be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff." (72)

Thus Judge Nordbye, the trial judge, states the evidence did not directly establish Malone was knowingly a party to the fraud. His opinion does not state, as counsel would intimate, that the circumstantial evidence indicated that Malone did know of the fraud. In his opening statement, at the trial, when challenged by defendant to state whether it was plaintiff's claim that Malone was guilty of corruption, plaintiff's counsel attempted to evade the question by claiming that he did not understand what was meant by the word "corruption", and declined to so charge Malone, and in his opening to the jury stated it was immaterial (46-47).

Plaintiff conceded, in the oral argument to the Circuit Court of Appeals, that the appeal did not involve tort liability on the part of Malone. Therefore, the statement of the Circuit Court of Appeals to the effect, "It is not claimed that he (the postmaster), had any knowledge of the fraud being perpetrated by Hunting," is correct in view of the complaint, the statements of counsel for petitioner, and the statement of Judge Nordbye.

The Bond.

In addition to the language set forth on Page 6 of plaintiff's Brief, it is to be noted that the bond reads:

"That * * * Malone * * * do bind ourselves * * * *to pay to the United States of America the*

sum of Sixteen Thousand Dollars * * *." (103) (Italics supplied)

Bond Statutes Involved.

Under the title "Bond Statutes Involved" (page 6 plaintiff's Brief) three statutes, are cited, namely, 39 U. S. C. A. Sec. 34; 5 U. S. C. A. Sec. 377 and 39 U. S. C. A. Sec. 815. Citation of the following statute is omitted, which is so significant that it was cited by the Circuit Court of Appeals in its opinion, as follows:

> "All suits * * * arising under the postal laws shall be brought in the name of the United States * * * 28 U. S. C. A. Sec. 732." (104)

Also omitted, are other statutes pertaining to this bond, unfavorable to plaintiff, which were of such significance that they were cited by the Trial Court (75-76). The statutes so omitted are:

> "Section 35. Approval of bonds. The bonds of all postmasters may by the direction of the Postmaster General be approved and accepted, and the approval and acceptance signed by the First Assistant Postmaster General or by the Fourth Assistant Postmaster General in the name of the Postmaster General."
>
> "Section 36. New bonds; application of payments. Whenever any postmaster is required to execute a new bond, all payments made by him after the execution of such new bond, may, *if the Postmaster General* or the Comptroller General *deem it just*, be applied first *to discharge any balance* which may be due from such postmaster under his old bond."
>
> "Section 37. Deficiency in accounts; notice to sureties. When a *deficiency shall be discovered*, in the accounts of any postmaster, who after the adjustment

of his accounts fails to make good such deficiency, it shall be the duty of the General Accounting Office to notify the Postmaster General of such failure, and upon receiving such notice the Postmaster General shall forthwith deposit a notice in the postoffice at Washington, District of Columbia addressed to the sureties respectively upon the bonds of said postmaster, at the office where he or they may reside, if known; but a failure to give or mail such notice shall not discharge such surety or sureties upon such bond."

"Section 38. Vacancies; appointment of successors; period of liability on bonds; temporary appointments. Whenever the office of any postmaster becomes vacant, the Postmaster General or the President shall supply such vacancy without delay, and the Postmaster General shall promptly notify the General Accounting Office of the change: and every postmaster and his sureties shall be responsible under their bond *for the safekeeping of the public property of the postoffice*, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in cases where there is a delay of sixty days in supplying a vacancy, *the sureties may terminate their responsibility by giving notice*, in writing, *to the Postmaster General, such termination to take effect ten days after sufficient* time shall have elapsed to receive a reply from the Postmaster General; and the Postmaster General may, when the exigencies of the service require place such office in charge of a special agent until the vacancy can be regularly filled; and when such special agent shall have taken charge of such postoffice, the liability of the sureties of the postmaster shall cease."

"Section 40. Release of sureties on bond. If on the settlement of the account of any postmaster it shall appear *that he is indebted to the United States,* and suit therefor shall not be instituted within *three years* after the close of such account, *the sureties on his* bond shall not be liable for *such indebtedness.*"

"Section 44. Neglect to render accounts. Whenever any postmaster *neglects* to *render his accounts* for one month after the time, and in the form and manner prescribed by law and the regulations of the Postmaster General, *he and his sureties shall forfeit* and pay *double the amount of the gross receipts at such office* during any previous or subsequent equal period of time; and, if, at the time of trial, no account has been rendered, they shall be liable to a penalty of such sum as the court and jury shall estimate to be equivalent thereto, to be recovered in an action on the bond." (Italics supplied)

Other pertinent Statutes are:

5 USCA, Sec. 22: "Departmental Regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

"5 USCA, Sec. 392: Adjustment and Settlement of certain claims for damages to person or property by Postmaster General. When any damage is done to person or property by or through the operation of the Post Office Department in any branch of its service, and such damage is found by the Postmaster General upon investigation to be a proper charge against the United States, the Postmaster General is invested with power to adjust and settle any claim for such damage when his award for such damage in any case does not

exceed five hundred dollars, and this authority shall hereafter be construed as extending to cases caused by the negligence of any office or employee of the Post Office Department or Postal Service acting within the scope of his employment. (As amended June 22, 1934, c. 717, 48 Stat. 1207)."

39 USCA, Sec. 790: "Delivery of stolen money to owner. Whenever the Postmaster General is satisfied that money or property stolen from the mail, or the proceeds thereof, has been received at the department, he may, upon satisfactory evidence as to the owner, deliver the same to him."

Postal Regulations Involved.

Under the heading of "Departmental Regulations Involved," plaintiff cites certain Postal Regulations.

In view of this fact, and because peculiarly connected with the question involved, this defendant deems it necessary to set forth a quotation from the opinion of the Circuit Court of Appeals as follows:

"The Postal Laws and Regulations, Edition of 1932, provide:

"Section 777. 1. Mail Matter should be delivered to the person addressed or in accordance with his written order.

"2. **When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office.** (Bold face type supplied.)

Section 816 provides for recovery of loss due to wrongful delivery from the postal employee responsible

therefor by the Chief Inspector by proceedings in the department, and that,

27. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear" (104).

Without explanation or comment, plaintiff omits (p. 10, Plaintiff's Brief) all reference to paragraph 2 of Section 777 of the Postal Regulations, which is unfavorable to plaintiff. The significance of this omission is at once apparent when reference is had to its attempted explanation of the meaning of this portion of the Regulation (p. 62, Plaintiff's Brief). This question is not before this Court on this appeal, but it goes to the very heart of the merits of the controversy between the parties. In sustaining its claim that Malone was guilty of intentional misdelivery of the mail, it was necessary for plaintiff to ignore the purport of the paragraph, and it is obvious this was the reason for omitting all reference to this paragraph of Sec. 777.

That such is plaintiff's purpose is more apparent when it argues (p. 62, Plaintiff's Brief) that said paragraph 2 grants no discretion to the postmaster. The language, "a person * * * claiming the addressee has verbally given him authority to receive it, *the postmaster, if he doubts the authority* * * *", indicates that the postmaster must exercise judgment in order to determine delivery thereunder. Action of that nature by the postmaster is discretionary. The delivery of the mail involved in this action was made in accordance with this paragraph of Sec. 777, and the action of Malone in so doing was perfectly proper and justifiable under the circumstances (72; 104).

So, it is apparent that whenever embarrasing to his contention plaintiff's counsel omits all reference to this paragraph of Sec. 777, although he had that section very definitely in mind when writing his brief (10; 36; 71-63, 65).

Government's Attitude Towards This Action.

The record indicates that petitioner sought permission from the United States to sue on the bond in the name of the United States, but this permission was denied by the Attorney General and no consent to this suit was ever given by the United States (57-60).

On page 11 of his brief, plaintiff's counsel quotes from a letter of the Attorney General. From this quotation it is apparent that in stating the matter to the Attorney General plaintiff's counsel claimed the right of action referred to was the "exclusive property" of his client. There is no showing what plaintiff's counsel stated to the Attorney General on the occasion of the conference referred to in this letter, and hence it cannot be concluded from the quoted excerpt that the Attorney General, when writing as he did, was considering the same factual situation as was presented to the trial and appellate courts and by them determined adversely to plaintiff. In fact, when the Attorney General wrote as he did, "a claim of the nature stated by you is a *question of law*," he thereby indicated he had no disposition to rule, and was not ruling, on the legal question here involved, except that his letter amounted to an explicit refusal of the United States to consent to the use of its name in this case or the bringing of this action (59).

To attempt to construe the purport of this letter from the Attorney General as plaintiff has done amounts to a refutation of the clear language of the statute (28 U. S. C. A., Sec. 732), which states:

> "All suits * * * arising under the postal laws, shall be brought *in the name of the United States.*" (Italics supplied)

The language "brought in the name of the United States" demands not only that suit be brought *in the name of the United States,* but that consent to the use of its name be obtained. If suit in its name can be brought without the consent of the United States, it means the Government has no control over the use of its name and the italicised words in the above quoted statute become meaningless. Surely the Congress, in using the language it did in the above quoted statute, had a clear purpose in mind; that purpose being that consent to the use of the name of the United States in any suit arising under the postal laws must be obtained and unless so obtained suit in its name could not be instituted or maintained. *Cf.* United States v. United States Line, 24 Fed. Supp. 427.

Nature of Action Involved.

The action is one on a contract, namely, on an acting postmaster's bond. It is not one in tort, or sounding in tort.

The Circuit Court of Appeals so states in the following language:

> "It will be observed that this *is not an action against a postmaster sounding in tort* * * * It is an ac-

tion on a bond by a stranger to the contract brought without the consent of the obligee." (Italics supplied)

Further the opinion of Judge Nordbye so indicates:

"*The action was brought* by the plaintiff, Midland Loan Finance Company, in the name of the United States, as above indicated, *to recover* damages against the principal and surety on a postmaster's bond * * * The complaint sought to recover the sum of $34,997.03 against the principal and $16,000.00 against the surety. Subsequently, the *plaintiff limited its right to recover against both defendants to the amount of the bond*" (70). (Italics supplied)

Plaintiff in open Court, as above stated by Judge Nordbye, limited its amount of claim against Malone to the amount of the bond, that is Sixteen Thousand Dollars, (63).

The action, both in the lower Court and the Circuit Court of Appeals, was tried on the theory that this was an action on a contract; the bond in question, and not one sounding in tort as suggested by plaintiff. It is elementary law that plaintiff after trial and appeal cannot shift or change his theory of liability and urge a new theory not before suggested.

At page 3 of Plaintiff's Brief, it is stated that the action is "to recover *loss sustained* by plaintiff through the postmaster's tortious diversion of numerous business letters etc. * * *"

The nature of this loss is important. Plaintiff's loss and the damages sought to be recovered were consequential damages and should be so characterized. This action was not commenced to recover the value of the letters sent, but

to recover the loss sustained by plaintiff because of forgery and other criminal acts perpetrated by one Hunting. (fol. 48). The Circuit Court of Appeals so characterized the damage claimed by plaintiff (102).

Ultimate Question Presented.

The ultimate question here presented is accurately stated by the Circuit Court, as follows:

> "On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, without the consent of the government, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee without the written consent of the sender?" (102).

The two questions suggested by plaintiff at page 3 of its Brief are necessarily included in the statement and determination of the question stated by the Circuit Court.

ARGUMENT.

I.

Plaintiff Has No Right to Sue on this Bond, in the Absence of Such Right to Sue Being Conferred by Statute, Either Expressly or by Necessary Legal Implication.

A. At Common Law, Plaintiff, as a Stranger to the Contract, Would Have No Right to Sue on this Bond.

From time immemorial, it has been a cardinal principle of the law of contracts that no person may sue on a contract unless he is a party thereto or has an interest therein, although he may be affected by it performance or failure. This basic rule has been adopted by this Court and is tersely stated in the case of German-Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 223, as follows:

> "A third person cannot sue for breach of contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest."

Also see:

Fosmire v. Nat. Surety Co., 229 N. Y. 44, 127 N. E. 472;

Robins Dry Dock etc. Co. v. Flint et al., 275 U. S. 303;

Washington v. Young, 10 Wheat. 406.

Therefore, if it be assumed that the statutes do not expressly or by implication create a right to sue in plaintiff, no consent to sue having been given by the government, plaintiff then has no right to maintain this action on the bond contract involved, being a stranger thereto.

B. The Language of the Bond Statute and Related Statutes Do Not Expressly Confer a Right in Plaintiff to Sue on this Bond.

The pertinent language of the statute reads as follows:

> 39 U. S. C. A. Sec. 34: "Every postmaster * * * shall give bond * * * *conditioned for the faithful discharge of all duties and trusts imposed on him, either by law or rules and regulations of the Department.*" (Italics supplied)

Inspection of this language indicates that no expressed right to sue is given plaintiff or any private person.

Nor is a right to sue expressly conferred by the language of any other statute or postal regulation. The Circuit Court so stated:

> "If it be assumed that the postmaster breached his bond by failure to compel Hunting to file with him written order of addressee, before delivering letters, in accordance with provisions of Sec. 777 of the Postal Regulations, it does not follow appellant is entitled to maintain the action. *No Federal Statute authorized such procedure.*" (104).

This was likewise the observation of the Trial Court, which said:

> "Other statutes which have a bearing on postmaster's bonds will be found in the footnote. *There is no provision or intimation in the statute that the patrons of a post office are to be given protection by the bond to be furnished.*" (Italics supplied)

It is obvious plaintiff has no right to maintain this action on this bond because of any expressed authorization by Congress.

C. The Language of the Bond Confers No Right in Plaintiff to Sue Thereon.

The pertinent language of the bond involved reads as follows:

> "* * * We, Patrick J. Malone, * * * bind ourselves * * * to pay *to the United States* of America the sum of Sixteen Thousand Dollars * * * The condition of this obligation is, if the said Patrick J. Malone shall * * * *faithfully discharge all the duties and trusts imposed on him as acting Postmaster either by law or by regulations of the Postal Department, and shall perform all duties as fiscal agent of the Government imposed upon him by law, or by the regulations of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon and required of him, by law or by regulations made pursuant to law, in connection with the postal system, then this obligation shall be void.*" (Italics supplied)

Inspection of the language of the bond indicates no express language is employed conferring upon plaintiff, or any other postal patron, a right to sue thereon. There is no suggestion or intimation from the language employed from which one, by implication, could conclude that such right was conferred or was within the contemplation of the parties at the time of its execution. The language employed requires the contrary conclusion that is, postal patrons, such as plaintiff, have no direct interest therein or any right to sue thereon. The correctness of this conclusion is manifest from an application of the rule of "ejusdem generis." The condition of the bond, first, requires performance of duties general in nature; then it refers to par-

ticular duties, which are duties pertaining and relating to the Government. Nowhere is language employed indicating coverage of anyone other than the Government.

Consequently applying the rule of "ejusdem generis", that is, that the general is to be governed by the specific, the only conclusion deducible from this language is that the parties, when executing the bond, contemplated and intended that no one but the Government should be within its coverage and protection.

D. The language of the bond statute, and related statutes, do not by necessary implication or legal intendment confer on plaintiff or any other private person a right to sue on this bond.

In the determination of this inquiry, attention must first be directed to the language of the statutes. Practical construction in ascertaining the meaning and intent of any statute so requires. If recourse is not had to the language itself, and the meaning of the statute is to be ascertained from outside factors alone, the construction adopted might well defeat the manifest intention of the statute and the purpose for which it was passed. Therefore, the self-evident rule that, when the meaning and intention of the statue is clear from the language itself that construction must be adopted.

The language here does not intimate, or even suggest, an intention or meaning that plaintiff or any other private person has any right or interest in such a bond. The language employed suggests, and only suggests, that a bond is required of a postmaster to insure faithful performance of the duties imposed on him by law and the regulations. It does not suggest, or in any way intimate, that

these "duties and trusts" imposed are owing to private persons. That the manifest intent is that they are duties owing to the Government rather than private persons, is immediately suggested by necessary implication when reference is had to other related bond statutes, and in particular to the following:

> "All bonds taken and contracts entered into by the post office department shall be made to and with the United States of America. (5 U. S. C. A. 377)
> All suits * * * arising under the postal laws shall be brought in the name of the United States. 28 U. S. C. A. 732"

The statute first above quoted states that the bond and contract shall be *made to and with* the United States of America. It does not merely direct that the bond shall be made payable *to* the United States. In addition, it expressly directs that it shall be made "with the United States." Obviously, the language "with the United States," unless considered mere surplusage, indicates that Congress intended by the statute to do more than specify to whom the bond is payable. This language indicates that Congress intended that not only is the bond to be payable to the United States, but the contract itself is one between the United States and the principal and sureties of the bond. In other words, it thereby expressly designates who the parties to the contract are, and by that language excludes private persons such as plaintiff therefrom. The expression of this intention on the part of Congress indicates the duties of the postmaster covered by the bond are duties to the Government, not private persons.

Later discussion will be had showing that all the duties of a postmaster are duties he owes to the Government rather than mail users.

Likewise inspection of all related statutes indicates that there is no suggestion from their language that a right is conferred to private mail users to sue on the bond. In fact the only sensible conclusion to be drawn from their inspection is to the contrary.

The Trial Court correctly so concluded in the following language:

> *"An examination of the statutes dispels any serious doubt as to the intention of Congress. It is apparent that the dominant purpose of this bond is to protect the Government. Certainly, if there are no statutory provisions which even suggest an intent to cover private losses, such absence must be accorded great weight in determining the intendment of Congress."*

The pertinent portion of Section 34, Tit. 39 U. S. C. A., which provides for a postmaster's bond, reads as follows:

"34. Bond. Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

Section 377, Tit. 5 U. S. C. A. provides:

"377. Form of bonds and contracts. All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America."

Other statutes which have a bearing upon postmasters' bonds will be found in the footnote.

"(fol. 96) *There is no provision nor intimation in the statute that the patrons of a postoffice are to be given protection by the bond to be furnished.* No assurance is given to the public that it may do business with the postal system and have recourse to the postmaster's bond. Section 36 would indicate that in the accounting the Government's loss alone was being considered in the bond protection. Further, it will be observed that in Section 37 the Government makes provision for the notice that must be given by it to the sureties of any deficiency as disclosed in the accounts of any postmaster. Nothing is said about the notice that should be given in the event any patron claims loss by reason of the postmaster's neglect. Section 38 pertains to the period of liability on a postmaster's bond and prescribes the method by which the sureties may terminate their responsibility in case there is a vacancy in the office of postmaster and delay in filling it. This section would indicate (fol. 97) that, although a postmaster's office is vacant, the sureties are not released and are responsible, for the safe-keeping of the public property of the post office and the due performance of the duties thereof. That the primary purpose of the bond is to insure the inviolability of government property is emphasized by this section. No reference is made therein to any obligation to third parties, or the circumstances under which sureties might be absolved of responsibility to them. Section 40 prescribes a three-year statute of limitations on the sureties' liability where suit shall not have been initiated within three years after the close of an account indicating liability of a postmaster to the United States. Section 44 provides that the sureties shall forfeit and pay double the amount of the gross receipts in the event the postmaster neglects to render his accounts (f 98) for one month after the time that they shall be due. Again, it may be pointed out that this provision, in

prescribing an arbitrary penalty, would seem to negative any intention that anyone but the Government shall be entitled to protection. The statutes may be searched in vain for even the sligitest suggestion that an intendment exists to protect the public against loss." (74-77). (Italics supplied)

Also the Circuit Court correctly so held in the following language (page 452):

"We are of the opinion, however, that these considerations are outweighed by the fact that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond primarily for the Government's protection. *It is reasonable to presume that Congress intended primarily to protect that interest in enacting the statute requiring postmasters to give bond. The related statutes and postal regulations all point to this conclusion. No inference may be drawn from them that Congress intended to extend the protection of the bond to private users.*" (Italics supplied)

Being unable to find any legal intendment to sue, the Circuit Court properly held that the principles followed in the case of Washington v. Young, 10 Wheat. 406, governed. There Chief Justice Marshall stated the rule in the following language:

"No person who is not the obligee of a bond, or its assignee, can put it in suit unless authorized to do so by the Legislature. It is not enough that a breach of the bond has damnified the person who brings the suit."

and further states:

> *"No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the legislature, and no person can be authorized to use the name of another, without the assent given in fact, or by legal intendment."* (Italics supplied)

The Howard Case Considered and Analyzed.

Before discussing the *Howard case,* plaintiff states that the Circuit Court confused the question of substantive and remedial rights. Instead of the Circuit Court confusing substantive and remedial rights, plaintiff has confused them.

As heretofore argued the Circuit Court, as well as the District Court, held the statute conferred no right expressly or by implication on private persons to sue on this bond. That is neither confusing or mystical. Yet it is with that suggestion that plaintiff would like this Court to approach its analysis of the *Howard case.* He suggests the analysis should turn on the single question: "Does a postmaster stand in a relationship toward private mail users that is akin to the relationship of Clerks of District Courts towards private suitors?"

At the outset, it must be conceded that the *Howard case* did not determine the right of private mail users to sue on postmaster's bonds. Nor is the decision authority for the proposition that the postmaster's bond statute conferred such right by necessary legal implication. Because the bond statutes relating to Clerks of Federal Court by implication create such a right, does not permit the conclu-

sion that the same implication or legal intendment arises from the statute relating to postmaster's bonds. The logic of these conclusions is especially true, since the statute construed in the *Howard case* contains other or different language than the Postmaster's Bond statute in this case.

Since the Court, in the *Howard case*, from the language of the statute there construed found a right to sue on the bond was conferred by necessary implication and legal intendment, if that case is to be a help here the question presented must be solved by reference to the postmaster bond statute for in that way only can we determine whether a right to sue has been conferred on plaintiff by necessary implication and legal intendment. This is the question to be determined, rather than a determination of the question of whether the relationship of a postmaster and clerk of court to private persons is similar.

It is elementary that any cause of action vested in any particular person or persons must arise by virtue of common law or by statute. As heretofore seen, because of the elementary rule of contracts no right at common law is conferred on plaintiff to maintain this action. This also is true of the *Howard case*. Likewise in this case, as in the *Howard case*, no statute expressly conferred such right.

In the *Howard case*, however, because of the language of the statute, the Court concluded that by necessary implication and legal intendment such right to sue was conferred on a private person. Here, too, our inquiry of necessity must be directed to whether or not the bond statute of the postmaster, in like manner, creates such right to sue. Similarity of relationship or other similar fact in the cases cannot be held to create a right that could only arise by

virtue of common law, or by virtue of a statute. So in our analysis of the *Howard case* our purpose will be to employ this method of approach rather than the one plaintiff suggests, in order to determine whether it is distinguishable from the case at bar.

The bond statute in the *Howard case* reads as follows:

> "Sec. 795. The clerk of every court shall give bond, in a sum to be fixed and with sureties to be approved by the court which appoints him, *faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk;* and a new bond may be required whenever *the court* deems it proper that such bond should be given. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safekeeping as *the court* may direct. A certified copy of such entry shall be prima facie proof of the execution of such bond and of the contents thereof." (Italics supplied)

The italicized words, "faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the Court in which he is clerk" clearly and necessarily in and by itself suggests and requires the conclusion that the right to sue is conferred, and the coverage of the bond extended to private suitors as well as the Government.

Decrees, judgments and determinations of the Court of necessity must refer to private cases as well as those instituted by the Government. The statute, therefore, by the very language employed, gives rise to the necessary implication that private judgments, as well as Government judgments, are within the coverage of the bond.

That this is the underlying principal productive of the result in the *Howard case* that a right was conferred on private persons to sue by legal intendment, is obvious. This Court's language quoted by the lower Court in its decision in this case so indicates. The language of the postal statute contains no such suggestion and allows no such implication.

See:

US. A. for the Use and Benefit of Midland Loan Finance Company vs. National Surety Corporation, 23 Fed. 411.

"Plaintiff relies upon Howard v. United States, supra (184 U. S. 676), *but the distinction* between the facts of that case and the instant situation is *reasonably clear. The statute governing clerks* of United States courts, which office was being considered by the court, required the clerk to give a bond to the United States conditioned, *'faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court.' The decrees, judgments, etc., obviously referred to proceedings in private cases, as well as the entry of these orders in litigation instituted by the Government. Congress evidently intended that a clerk's failure timely to enter or satisfy judgments in behalf of private suitors, for instance, would constitute a breach of the bond.* The dominant purpose of the statute was not to protect the Government alone. *Private litigants stood on an equal footing with the Government.* There is *no provision in any of the* (fol. 100) *statutes pertaining to a postmaster's bond which conditions the bond upon the postmaster's performance of any specified or direct duty to the public.* The court placed *particular emphasis upon the language of the statute* providing for *the bond* that should be given *by the clerk*, and *it is clear that it determined that, by reason of this lan-*

guage, Congress intended to afford coverage to the public where it had been damnified by the clerk's breach of duty." (Italics supplied)

In discussing the liability of the clerk's bondsmen to private litigants, the court in the *Howard case* stated (p. 687):

"But it is said that the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the Government; and therefore no suit can be maintained on it for the benefit of an individual suitor, although such suitor may have been damaged by the failure of the clerk to discharge his duty. This results, it is supposed, from the fact that there is no statute expressly authorizing such a suit. If this position be well taken, it would follow that the bonds required to be given by clerks of the Federal courts are not in any case for the protection of private suitors. We are of opinion that Congress never intended that any such condition of things should exist, but intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to forty thousand dollars. *It is impossible to suppose that, when requiring a clerk to give bond to the United States 'faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court,' Congress had in mind the interests of the United States alone; and purposely refrained from making any provision whatever for the security of private suitors in the Federal courts. Such a conclusion would be inconsistent with the practice of a century,* and would greatly surprise the profession. As may well have been anticipated when those courts were first established, the great mass (fol. 101) of litigation in the District

and Circuit Courts of the United States has always been between individuals, *and consequently the words above quoted, it must be assumed, had reference to individual suitors as well as to the United States.* In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge his duties or seasonably to record the decrees, judgments, and determinations of the court. It must have been so understood when the courts of the United States were established and provision made for the appointment of clerks who should be entitled to receive the moneys of suitors when paid into court under its sanction or pursuant to any statute.

That there were more private than public litigants doing business with the office of clerk of court was especially true when the statute referred to in the Howard case was adopted. Private litigants directly depend upon the clerk of court faithfully to discharge the duties of his office. *He owes a direct duty under the statute to private litigants.* Large sums of money belonging to private suitors are often paid to the clerk. Such moneys are not paid to the Government as such. *Private suitors rely upon the clerk 'seasonably to record the decrees, judgments, and determinations of the court.' The use of this language must imply an intention on the part of Congress to permit a private claimant*, who has been damaged by the clerk's malfeasance, *direct recourse against the bond.*" (78-79) (Italics supplied)

After determining that the language of the statute standings alone conferred no right to sue on the bond of the Clerk of Court, this Court, as the language above indicates, suggested other facts and factors bearing on such intent, and referred to them in the opinion, such as the "peculiar rela-

tion" of the clerk to the public, etc. It was these factors, that amplified the language of the statute itself to the point where the right to sue was recognized. That situation is not this case.

The Letter of the Bond Statute Negatives a Right to Sue in Plaintiff.

At page 28 plaintiff contends the letter of the law confers benefits on mail users. It, then, concludes these benefits create an interest and right to sue on the acting postmaster's bond.

The trial court adequately answers this contention in the following language:

> "It is urged that, in that Section 34 requires a bond to be conditioned for the postmaster's 'faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department,' such clause is sufficient to include the duties and trusts that a postmaster should fulfill in carrying out the obligation that he owes to the public. But, in this connection, it must be recognized that this provision does not create any scope of coverage (fol. 99) inconsistent with the defendant surety company's position that it is limited to the named obligee. Obviously, there was no duty on the part of Congress to extend the coverage to the public. If it intended that the protection be limited to the named obligee, the quoted language from the statute would be the usual and customary covenants to be incorporated in the bond. The Court does not understand that a third party has the right to sue on an official bond merely because such right has not been specifically excluded. The burden nevertheless rests upon the plaintiff to establish that

such right is expressly given or necessarily implied." (77)

In this connection, plaintiff places great stress on the use of the word "all" in the postmaster's bond statute. It assumes since the word "all" is used, it must refer to those statutes and regulations that impose certain duties on the postmaster relative to the handling and delivery of mail. It further assumes, because mail patrons get some indirect benefit, this necessarily shows an intention by Congress to confer a right to sue on the bond. Surely, the word "all" in and by itself connotes no such suggestion or inference. That such indirect benefits cannot create a right was well recognized by the Trial Court, when he said (f. 112):

> *"The interest that every citizen may have at times in the faithful performance of duties of public employees or the fact that damage results to him from failure of such employee to fulfill carefully his duties does not create the right in third person to obtain the advantage of any contract, official or otherwise, to which he is not a party unless it be shown it was intended for his direct benefit."* (Italics supplied)

The word "all" does nothing more than refer to the duties of postmasters to the Government, and the mere fact that plaintiff and other mail patrons might be indirectly benefited thereby in no way affects the meaning of the language used so as to create in plaintiff a right to sue. That all duties are owing to the Government, rather than mail users, will hereinafter be discussed in this Brief.

Plaintiff Seeks Judicial Legislation.

As before shown, the language of the statute does not expressly, nor impliedly by legal intendment, confer on plaintiff the right to maintain this action. When plaintiff argues such right is conferred it is guilty of the very vice it accuses the surety of at page 43 of its Brief. It places a meaning and intention into the statute that the language itself does not permit and that Congress never intended. In effect it attempts to insert into the statute the misconceived notion that the statute itself creates direct duties to mail patrons, and that the word "all" in the bond statute should be so expanded to include them." To attempt to insert a meaning in a statute which is clearly not there nor intended, is an exemplication of judicial legislation in its most abhorrent sense.

The Fact that the Bond Is to Be Made to and With the United States Is An Important Factor in Determining Legal Intendment.

At page 43 plaintiff claims that the fact that the United States was the sole obligee named in the bond is not a controlling factor. Although this statement on its face appears correct, it must be remembered that the statute, as heretofore argued, provides that the bond be made "to and with the United States." This is not a case, such as the *Howard case* and other cases cited by plaintiff, where the bond statute itself either expressly or by implication confers coverage and the right to sue. The situation is quite to the contrary, since the postal statutes indicate no such right exists. Therefore, the fact that the statute and bond itself name the United States as the obligee is a factor

that may be considered as amplifying the intention expressed in the language of the statute. Although it in itself might not be the controlling factor, it is a factor which the court can and should consider.

The Bond Does Not Cover Both the Government and Mail Users.

Although the statute by its terms provides that the bond may be fixed "in such penalty as the postmaster general deems sufficient" this in itself does not permit the conclusion that the bond confers a right on plaintiff to sue thereon or brings plaintiff within its coverage.

The obvious purpose in not fixing a definite limit on postmasters' bonds by statute is at once apparent when one considers the vastness of the system. Post offices exist in every hamlet as well as the largest metropolis of the nation. Obviously, the Government's risk of loss of its property is, in a sense, dependent upon the amount of business transacted in different offices in different parts of the nation. A bond in a small amount might cover the risk in a small community, while a bond in an amount greatly disproportionate would be required in other communities. The evident intent of Congress in leaving to the discretion of the Postmaster General the amount of the bond to be exacted from a postal employee was occasioned by the thought that because of his experience and acquaintance with the postal system and its operation, he could more adequately ascertain the amount of the bond necessary for the Government's protection than could Congress.

It should also be noted that if a postmaster bond is to cover losses of mail patrons, and especially losses of con-

sequential nature, such as plaintiff seeks to recover in this case, no one could ever ascertain what would be adequate protection. Not even would the Postmaster General, who might in the case of Government losses be able to ascertain somewhat adequately the necessary amount of coverage, be able to determine a liability so indefinite. He would be in no better position than anyone else to determine what coverage would be adequate to cover that situation.

Appellant further argues at page 58 that even if the bond is for the primary benefit of the Government that does not exclude plaintiff as secondary beneficiary. Plaintiff here again falls into the same error as previously suggested; either the bond confers a right by necessary implication or it does not. As shown, no such right is conferred. The mere fact that plaintiff receives indirect benefits, and by virtue thereof classifies himself as a secondary beneficiary, cannot create in plaintiff a right to sue.

Departmental Regulations Confirm the Intendment Expressed in the Statute that Plaintiff Has No Right to Sue.

Sec. 816 of the Postal Laws and Regulations of 1932, provides for suits by the United States and distribution by officials of the Postal Department among persons damaged by "wrongful delivery of * * * mail." This section sets up elaborate machinery and defines the procedure to be taken by private mail users for a loss sustained through negligence of postal employees.

The foregoing regulation, therefore, confirms the intention expressed in the statute itself that no one other than the United States can maintain a suit on this bond contract.

The Spirit of the Law Negatives a Right to Sue in Plaintiff.

Plaintiff argues that the purpose of the postal system from which the public receives benefits indicates that the spirit of the law gives plaintiff a right to sue. The fact that mail patrons, or the public generally, are indirectly benefited, because of the postal system, does not necessarily compel the conclusion that Congress intended the bond of a postmaster for the protection of a private mail user. Likewise, the fact that the regulations and statutes prescribe certain rules relative to the delivery of mail does not necessarily compel the conclusion that those statutes create direct duties from the postmaster to the postal patrons, rather than direct duties from the postmaster to the Government.

The fallacy of plaintiff's reasoning as to the spirit of the law is manifest by reference to the following case cited by it at page 103 of its Brief.

> "In Public Clearing House v. Coyne, 194 U. S. 497, 506, this Court said:
>
> "*The Postal service is by no means an indispensable adjunct to a civil government*, and for hundreds, if not for thousands, of years, *the transmission of private letters* was either *intrusted to the hands of friends* or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times, and was recognized in the Constitution and in some of the earliest acts of Congress, the rates of postage were so high, and the methods of transmission so slow and uncertain, that it was not until 1845, when the post-

age was reduced to 5 and 10 cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance it now possesses.

"*It is not*, however, *a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defense of the government against insurrection and foreign invasion*, **and the administration of public justice are**; but *is a public function, assumed and established by Congress* for the general welfare, and in most countries *its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue* to the government, and really operates as a popular and *efficient method of taxation*. Indeed, this seems to have been originally the purpose of Congress." (Italics and boldface supplied)

It will be observed from the language of this Court that the operation of the postal system is a proprietory rather than a governmental function. It is a function engaged in by the Government as a corporation running a business, rather than one that is a necessary part of civil government, such as the protection of life, liberty, property or *the administration of justice*. Correctly viewed, the Government role is in the nature of employer and the role of the postmaster is that of employee. The role of private persons in using the postal system is the same as the indirect benefit from any private business. Statutes passed by Congress and regulations imposed by the Department must be construed in the light of this fact. The proprietor and employer of any business may have rules and regulations relative to the transaction of said business which indirectly may benefit private persons. The fact that private persons may be indirectly benefited because of the im-

position of these duties by employer upon employee does not mean that those duties are duties owing to the private person upon which private rights can be founded. They are rather duties that the employee owes to the employer, and which the employer imposes in order to promote the efficient operation of his business. The United States Government, as proprietor of the postal business, in enacting the statutes and regulations imposing duties upon its employees, postmasters and other postal officials, throughout the country, of necessity, required these duties, even those relative to delivery of mails, in the same sense as any proprietor of any other business. It imposed them to promote the more efficient operation of its business and to increase its revenues, which this Court concluded "operates as a popular and efficient method of taxation." In short, the Government, as proprietor, imposed these duties on its employees for its own purpose to more efficiently operate its business, in the same way as an employee of a telegraph company may be required by his company and its rules and regulations, to promptly deliver telegraph messages. The duty is imposed by the Company for its own benefit, although the public indirectly benefits thereby. The employee owes the imposed duty to his employer not the public. Further, if a fidelity bond be required by the employer conditioned on the faithful performance by the employee of all the duties imposed by the rules and regulations of the company, this bond and the sureties thereon could only be sued by the employer for breach of that duty. Clearly, the person damaged because of misdelivery of a telegram could not sue the surety on such a bond. So, in this case, since the duties of Malone created by statute and the regulations are

duties owing to the Government rather than private persons, the bond does not cover any duties owing to private persons, since all the duties imposed are duties to the Government.

There is another fundamental principle which distinguishes the instant case from the *Howard case*. In the *Howard case* the Clerk of Court being an officer of a function of Government i. e. the administration of public justice, (which is a necessary part of Civil government in the same sense as the protection of life, liberty, and property) that function and his duties in that field are essentially governmental in nature rather than proprietary. Consequently, the duties imposed upon him by statute or regulations are direct duties that are owing to litigants in his court rather than the indirect benefits that a mail user might receive from patronage of the postal system.

Thus when we consider the essence and purpose of the postal system, in ascertaining the spirit of the law, its spirit leads us to the same conclusion as the letter of the law, namely, that plaintiff has no right to maintain this action on this bond.

Absence of Any Express Legislative Intent, or that Arising by Implication, and Absence of Consent of the United States Conferring a Right to Sue on the Bond, Precludes Plaintiff from Maintaining this Action.

In Washington vs. Young, supra, the City of Washington conducting a lottery employed a manager who had given a bond to the city. The suit was instituted in the name of the city for the benefit of the purchaser of a lottery ticket, with-

out the city's consent, on the grounds of the alleged breach of the bond by the manager of the lottery.

THE COURT HELD:

> "No person who is not proprietor of an obligation can have a legal right to put it in suit unless such right is given by the legislature and no person can be authorized to use the name of another, without his assent given in fact or by legal intendment * * * The proprietor of ticket 1037 has shown no right to sue on this bond * * * but, if they have, without authority, put this bond in suit the proper course is to turn them out of court, not to render a judgment which may bar any future suit brought by plaintiffs whose names they have improperly used."

In German Alliance Ins. Co. v. Home Water Supply Company, 226 U. S. 220 the defendant entered into a contract with the City to maintain and supply the city with suitable pipes and water works for fire purposes. Upon the failure of the City to sue, the Insurance Company brought action against the Water Company to recover damages sustained by reason of its payment of fire losses to buildings it insured, which resulted from the failure of the Water Company to fulfill its contract with the City. In sustaining a demurrer to the complaint, this Court said:

> "For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, *they may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names* * * *
> "The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen

has in the perfomance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action. "He is interested in the faithful performance of contracts of service by policemen, firemen, and *mail contractors*, as well as in holding to their warranties the vendors of fire engines. All of these employes, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue—though he suffer loss because *the carrier delayed in hauling the mail*, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire.

"Each of these promisors of the city, like the Water Company here, would be liable for any tort done by him to third persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone." (p. 230-231) (Italics supplied)

Idaho Gold Reduction Co. et al. vs. Croghan, et al., 6 Ida. 471, 56 Pac. 164 was an action on a postmaster's bond by a private person. The Court said:

"We know of no law authorizing the bringing of a suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute."

In Wile v. U. S. Fidelity & Guaranty Co., 6 Alaska 48, another case of a suit by a private person on a postmaster's bond, the Court said:

"I cannot see that any cause of action is stated in favor of Wile against the surety company. There is no privity of contract between them. The bond runs to

the United States of America, and by its terms is to protect the Government."

See also:

U. S. v. Griswold, 76 Pac. 596;
Robins v. Dry Dock and Repair Co. v. Flint et al., 275 U. S. 303;
Fosmire v. National Surety Company, 229 N. Y. 44, 127 N. E. 472;
Clark v. U. S., 60 Ga. 156;
U. S. v. U. S. Lines Co., 24 Fed. Supp. 427.

The rule in the foregoing cases, which were cases where no authorization to sue was given expressly or by legal implication, governs this situation, rather than the *Howard case*, where clearly such right was intended by the statute there construed when considered in the light of the purpose of its enactment.

II.

The Doctrine by Which the United States Sues as Bailee to Recover Loss Sustained by Private Persons, Together With the Postal Regulations, Provides the Exclusive Remedy for Losses Suffered by Private Persons.

The postal regulations and statutes prescribe in detail the procedure by which a mail patron is to recover damages for a loss sustained by him by reason of the acts of postmasters or postal employees.

This protection afforded the public was discussed by the trial court (80) as follows:

"It is evident that, by the adoption of various rules and regulations, the Government has endeavored to protect the public against the usual and normal losses that may occur on account of carelessness in the handling of the mails or otherwise. The payment of money to a postmaster on (fol. 103) postal savings, for instance, constitutes a direct obligation on the part of the Government to the patron. Provisions are made for registering and insuring mail matter. In Tit. 5 U. S. C. A. 392, as amended June 22, 1934, the Government has outlined a summary method of settling claims arising by reason of the negligence and misconduct of the postmaster, where the same may be settled for less than $500.00. In Tit. 31 U. S. C. A. 215, and also found in Section 59 (2) of the Postal Laws and Regulations; the head of the department is authorized to adjust and determine any claim on account of damages to, or loss of privately owned property where the amount of the claim does not exceed $1,000.00, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. The Postal Laws and Regulations under Section 59 (2) have promulgated detailed rules covering claims for such damages. Section 790, Tit. 39 U. S. C. A. and Postal Laws and Regulations No. 233 provide means whereby the postal department may distribute moneys that have been recovered through administrative action in instances where such moneys have been stolen from the United States mails. Section 816 of the Postal Laws and Regulations provides for suits by the United States and the distribution by appropriate administrative (fol. 104) officers of the Postoffice Department among persons damaged by loss, rifling, damage, wrongful delivery of, or depredations upon registered or other mail, and the failure to collect or remit C. O. D. funds.'"

These regulations have been in force and effect for many years. As stated in Helvering v. Winmill, 305 U. S. 82, 83

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended and substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."

Accord: Brewster v. Gage, 280 U. S. 327.

So here the statutes together with the postal regulations are to be construed as having the effect of law. Where the regulations such as these cover the subject matter of the claim and provide a remedy, that remedy must be taken as the exclusive one. This Court so held in Globe Newspaper Company v. Walker, 210 U. S. 356, when it is stated:

> "A general liability created by statute without remedy may be enforced by an appropriate common law action, but where provision of liability is coupled with provision for a special remedy, that remedy, and that remedy only, must be employed."

The Trial Court was cognizant of this when it said:

> "It may be urged that the various administrative remedies afforded to patrons who may have sustained losses are not necessarily exclusive but are merely cumulative to the right of a private claimant to proceed against the bond. However, that argument might be persuasive if there existed any apparent intention manifested by Congress to provide direct bond protection for private patrons. The regulations and administrative remedies become significant, however, because they tend to support the position that, not only has the Postoffice Department, as well as Congress, assumed that no direct remedy was afforded a private

citizen under a postmaster's bond, at least without the obligee's consent, but it would appear that such remedies negative the implied intention which is the basis of this suit." (81-82).

The Rule that the Government, as a Bailee, Can Recover On Similar Bonds for Theft of Registered Letters and the Like, Is Not in Conflict With the Circuit Court's Opinion that Plaintiff Has No Right to Sue on the Bond.

Since the duties imposed, by statute and regulations, are direct duties owing from the postmaster, as employee, to the Government, as proprietor, it necessarily follows that an action commenced on the bond insuring performance of those duties, can be commenced only by the obligor, the Government, or proprietor. A private person, even though damnified as a result of a violation of those duties, cannot maintain an action on the contract insuring their performance merely because he is indirectly benefited. Nothing, of course, would preclude a private person receiving such indirect benefits from suing in tort at common law for his damages. He would be able to maintain his action, both against the employee as well as the proprietor, on the theory of respondeat superior. It must be recognized, however, that the Government cannot be sued in its sovereign capacity and is not liable under the doctrine of respondeat superior. The United States in operating its postal business, like the employer in any other private enterprise, is interested in protecting private persons from damage by reason of the acts of its employee. Although in such cases there is no *legal obligation* on the part of the Government, the Courts nevertheless (and rightly so) hold it has a *moral obligation* to collect damages for private mail users.

Thus the rule that where a mail user is damaged by acts of postal employes, the United States, being the only party who can maintain an action on the bond, may maintain it as bailee for the benefit of such private mail users and thus carry out its moral obligation to them above referred to. This reasoning is in no way in conflict with the decision of the Circuit Court of Appeals in this case but is in accord therewith.

See:

National Surety Company v. U. S. (8 Cir.) 129 F. 70;
U. S. v. American Surety Co. (C. C. Ill.) 155 F. 941;
U. S. v. American Surety Company (4 Cir.) 163 F. 228;
Gibson v. U. S. (1st Cir.) 208 F. 534;
U. S. Fidelity & Guaranty Co. vs. U. S. (9 Cir.) 246 F. 433.

IX.

THE QUESTION OF THE POSTMASTERS LIABILITY IN TORT IS NOT BEFORE THIS COURT.

As heretofore argued in this Brief, and as stated by the trial and Circuit Court of Appeals this action is on the contract, that is the bond, and not one in tort.

Under the heading "Nature of Action Involved" in this Brief, full discussion is had of the theory upon which this case was submitted in the trial court and also the Circuit Court of Appeals.

Thus when plaintiff asserts at page 79 of its Brief, "that postmasters are truly liable for their wrong is an old and well-established doctrine," that argument, of itself, is of no

significance or aid in the determination of the question before this Court. Never was the contention urged that postmasters are not liable in tort at common law for injuries sustained by private persons. That question is, however, a different question than the one here involved. The question here involved is, whether a private person may sue on a contract between the Government and the postmaster. Therefore, the cases cited by counsel in his Brief on this point are in no way helpful or determinative of the specific question before this Court.

The record does not establish that the postmaster was liable in tort to plaintiff as stated by him at page 77 of its Brief. Plaintiff on page 78 of its Brief states that the postmaster's Answer did not deny that his acts did not make him liable to plaintiff. This is not true as shown by the following portion of the Answer:

III.

"Defendant, Malone, further specifically denies that the injuries and other damages set forth in the complaint, was caused by any breach of duty or trust on the part of said defendant, Malone, or any wilful, negligent, or unlawful acts of said defendant, Malone, as set forth in said complaint, but alleges in truth and in fact, that any damages that may have been sustained by said plaintiff, were due wholly and solely, to the criminal acts of said Hunting as set forth in said complaint, and that said damage was proximately caused by the acts of said Hunting, and in no way caused by any neglect of duty, wilful, wrongful, or negligent acts on the part of said defendant, Malone." (33).

Further, the mail matter involved in this case was delivered pursuant to paragraph 2 of Section 777, which states that the postmaster may deliver mail matter to the person claiming the addressee has verbally given him authority to receive it unless he doubts the authority, in which case he may require written authority from the addressee.

The Circuit Court of Appeals by the following language inferentially recognized that the postmaster, in the absence of doubt, might properly deliver mail matter on oral authority:

> "If it be assumed that the postmaster breached the bond by failing to require Hunting to file with him the written order of the addressee before delivering the letters in accordance with the provisions of Section 777 of the Postal Regulations it does not follow that appellant is entitled to maintain the action." (104).

Furthermore that Court recognized that the record did not indicate Malone was guilty of tort, by stating, "If it be assumed."

This was one of the questions raised throughout the trial and preserved by the Motions for Directed Verdict (61-63).

Further Judge Nordbye's opinion and decision indicates that no question was considered save and except the question of the coverage of the bond and of plaintiff's right to sue thereon. The trial Court said:

> "The Court is of the opinion, that if the right to sue on the bond existed, it would have jurisdiction, but a further discussion of the other grounds presented in the motion (fol. 133) becomes unnecessary in view of the conclusions indicated" (87).

In addition to the foregoing, various references are made in Judge Nordbye's order to other provisions of the postal laws and regulations, and companion statutes (f. 102-103). The verdict of the jury, having been set aside by the judgment, is not before this Court. Therefore plaintiff's claim that the record shows the defendant Malone is liable in tort is manifestly erroneous, and more than that discusses a question not before this Court.

The mere fact that the court dismissed as to the defendant Malone on the grounds that in the absence of the defendant Surety necessary diversity of citizenship would be lacking, in no way grounds the conclusion that defendant Malone was liable in tort. With the defendant Surety Company out of the case, it readily appears that the suit resolved itself into a suit between the Midland Loan Finance Company and Malone, both of whom are citizens of the State of Minnesota. The Court could dismiss the action as to Malone on the grounds of lack of the requisite diversity of citizenship, as well as any other grounds. The mere fact that the Court ascribed this reason for dismissing the action does not mean that he could not have also ascribed other grounds.

CONCLUSION.

This case is of great importance not only to Malone but to every postal employe in the service of the nation.

In operating the postal system the government is functioning in its proprietary capacity. In the beginning the postal system was of small proportion, but through the years has developed into a tremendous business extending to and beyond the boundaries of the nation. To efficiently

operate this far-flung business, Congress has passed necessary statutes and the postoffice department has adopted necessary regulations, all designated to effect that purpose. Both the statutes and the regulations provide for the giving of bonds by postmasters and other postal employees to protect the United States, their employer, against a breach of the regulations governing their conduct and operations as employees of the vast postal system. In this case Malone, like every other employee of the far-flung postal system, sought to perform the duties imposed upon him by those regulations in accordance with their provisions. Those regulations and the statutes complementing them direct him in the conduct of his duties. He has no election as to the mode of their performance save and except the limited discretion conferred upon him by the regulations in certain specified instances. In this case Section 777 of the Postal Regulations, particularly paragraph 2 thereof, authorized him to exercise his judgment in determining whether delivery of the mail matter here involved could be made to Hunting. By that very regulation the United States as his employer authorized and sanctioned such delivery. Surely where, as here, he acted honestly in exercising that judgment, he should not be criticized for the results of his so doing, much less be subjected to the annoyance, expense and imputation of dishonesty resulting from an action such as this.

Furthermore the subsequent official action of the United States as his employer in elevating him to the position of postmaster, after full investigation of the claims and criticisms of plaintiff, show not only full authorization for and sanction of his conduct in delivering the mail matter to Hunting under the circumstances disclosed by the record,

but such promotion is a positive acknowledgment by the United States that Malone in so delivering the mail matter here involved properly performed the duties of his office as acting postmaster. The situation is simply one where Malone, the postal employee, has fully performed the duties of his office as required by the statutes of the United States and the regulations of the postoffice department, and his superiors have found him guilty of no misconduct justifying or permitting any claim to be made on his official bond as acting postmaster.

Disregarding all this, plaintiff claims the right to maintain an action on the bond of Malone as acting postmaster. The action so asserted is not one sounding in tort nor upon tort, nor is it grounded on any violation of any common law right, nor upon any showing of misconduct by Malone in the performance of his official duties. The sole basis of the asserted right of recovery is a contract which by its own language and the language of all related statutes and departmental regulations, expressly negatives any such right to sue or any interest of the plaintiff therein.

The action asserted is peculiar in another sense: it seeks not the recovery of the value of the mail matter allegedly misdelivered, but rather consequential damages arising from such alleged misdelivery. The damages so asserted arose not from the act of misdelivery but were directly occasioned by the forgeries of Hunting and were suffered before any use was made of the mails by plaintiff in the particular transaction. The claim is made that if Malone had not delivered to Hunting the mail matter involved plaintiff would have sooner discovered Hunting's forgeries and thereby possibly prevented later loss. This theory ignores

Malone's ignorance of the content or purpose of the mail matter allegedly misdelivered to Hunting; it purposely ignores the authority for Malone to deliver such mail matter to Hunting (paragraph 2, Section 777, Postal Laws and Regulations).

Stripped of all verbiage, plaintiff's contention is that it, as a private mail user of the postal system, (although only incidentally and minutely benefited thereby) can maintain this action so as to have the conduct of Malone as a postal employee of the United States tested by a court and jury even though the United States, by Malone's superiors in the postoffice department, has fully examined into his conduct and has ratified it as proper and in conformity with the Postal Laws and Regulations. This contention places not only Malone but every employee of the postal system in the position of serving two masters and requires that they follow two standards of conduct which at times might be (and in this case are) opposite and utterly inconsistent: one, that prescribed by the United States, his employer; the other, that dictated by courts and juries at the instance of a private mail user. Surely no such anomalous situation was ever contemplated by Congress, the postoffice department or the officials in charge of the postal system. The chaotic results that would flow from that situation and the inconceivable position in which every postal employee would thus be placed needs no further comment.

It is most significant that throughout plaintiff's brief, its counsel leans heavily on the Postal Laws and Regulations in measuring or grounding its asserted right of action, but when it comes to being itself bound by the terms and provisions of the Postal Laws and Regulations it ignores them

completely and claims it has no coexisting duty or obligation to look to them for its recovery or relief in the situation complained of. Particularly is this true of Section 816 of the Postal Laws and Regulations.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, a Corporation,

Petitioner,

vs.

NATIONAL SURETY CORPORATION, a Corporation, and PATRICK J. MALONE,

Respondents.

BRIEF FOR RESPONDENT NATIONAL SURETY CORPORATION.

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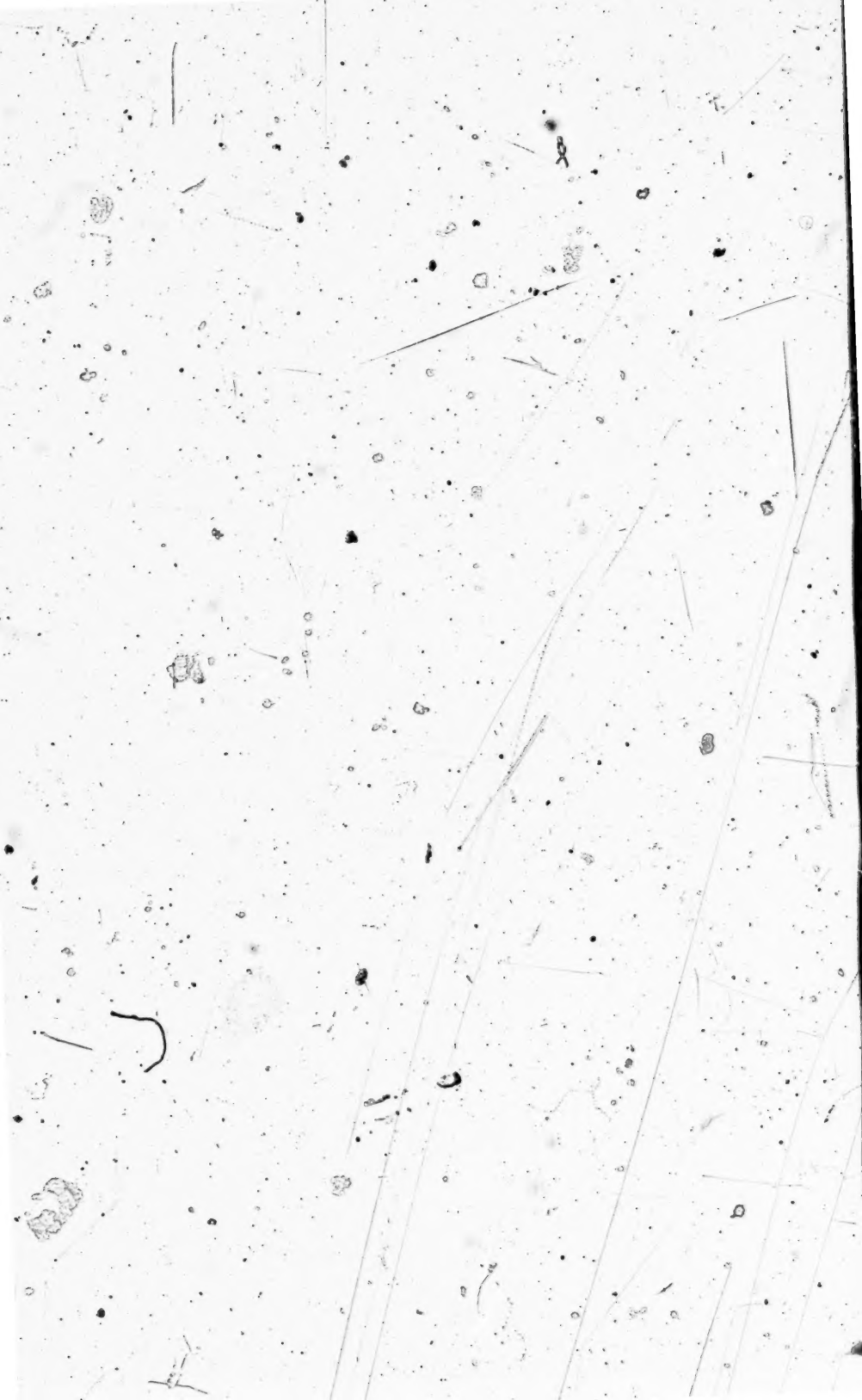

INDEX.

	Page
OPINIONS BELOW	1
GROUNDS OF JURISDICTION	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
THE BOND INVOLVED	6
THE STATUTES INVOLVED	6
THE POSTAL REGULATIONS INVOLVED	7
ARGUMENT	11

I. Plaintiff's right to sue depends upon its establishing that Congress intended: (1) that patrons of the Post Office Department be covered by a postmaster's bond and (2) that such patrons should have a right to sue in the name of the United States without its consent; and (3) that such bonds should cover consequential damages to such patrons 11

II. Factors demonstrating that Congress did not intend: (1) that patrons of the Post Office Department should be covered by a postmaster's bond, or (2) that such patrons should have a right to sue in the name of the United States without its consent, or (3) that such bonds should cover consequential damages to such patrons 15

1. The surety contract in suit being collateral to an employment contract, the obligations under the surety contract are owed to the promisee in the employment contract—the Government 16

2. Upon familiar principles, the conditions of the bond indicate that it refers to duties owed to the Government rather than to patrons of the post office 17
3. The interest of the Government in the protection of its own money and property in the hands of postmasters forbids a construction which permits exhaustion of the Government's security by private persons. 21
4. Omission of Congress to expressly provide for suit by private persons on post office bonds indicates its intention to grant no such right, since Congress has made express provision for such suits upon other kinds of bonds 29
5. Suit must be in name of United States... 30
6. The Postal Regulations provide an exclusive remedy for plaintiff 36
7. Registry, insurance, and other provisions for the protection of mail users evidence the intention of Congress that postmaster's bonds should be for the exclusive protection of the Government 41
8. The absence of any relation between the penalties of postmaster's bonds and the possible consequential damage to patrons from the loss of mail evidence a lack of intention that such patrons and losses be covered by the bonds 42
9. Failure of Congress to adjust premiums to increased liability claimed by plaintiff indicates no intention to impose such liability 43

10. Plaintiff's claim is without precedent and inconsistent with the understanding of the profession and the practice of the Government for a century and a half 43
11. Statement of plaintiff's claim defeats it.. 45
12. Bond does not cover mail user's consequential damage 49

III. Application of the law to the foregoing factors negativing Congressional intent claimed by plaintiff 51
1. Washington v. Young (1825), 10 Wheat. 455 51
2. Cases following Washington v. Young ... 54

IV. Factors claimed by plaintiff to establish an implied Congressional intention: (1) that the obligations on a postmaster's bond are owed to patrons of the postal service; and (2) that such patrons should have a right to appropriate the name of the United States to maintain their private lawsuits on such bonds 66
1. Plaintiff claims that mail users are benefited by postmaster's proper performance of his contract with the Government, and therefore have a substantive right 66
2. Howard v. United States, (1902) 184 U. S. 676 69
3. Remaining cases cited and quoted by plaintiff 74

CONCLUSION 78

TABLE OF CASES.

	Page
Atchison, T. & S. F. Ry. v. United States, 225 U. S. 640	48
Bowers, Collector of Internal Revenue, v. American Surety Co., 30 F. (2d) 244	63
Chicago, etc. Ry. Co. v. Maryland Casualty Co., 75 F. (2d) 596, 598	59
Cox v. United States, 6 Peters 172	65
Davis v. Clinton, 54 Iowa 59	56
Deal v. United States, 11 F. (2d) 3	68
District of Columbia, to Use of Langellotti, v. Fidelity Deposit Co. of Maryland, 271 Fed. 383	59, 65
Dunn v. O'Connor, 89 F. (2d) 820	39
Federal Surety Co. v. Minneapolis Steel & Machinery Co., 17 F (2d) 242	59
Fosmire v. National Surety Co., 229 N. Y. 44, 127 N. E. 472	19, 59
Germain, etc. Co. v. Home, etc. Co., 226 U. S. 220	48, 54, 60
Globe Newspaper Co. v. Walker, 210 U. S. 356	39
Grady v. United States, 98 Fed. 238	68
Helvering v. Winmill, 305 U. S. 79	40
Hendrick v. Lindsay, 93 U. S. 143	55
Howard v. United States, 184 U. S. 676	23, 30, 32, 54, 61, 64, 69, 74
Idaho Gold Reduction Co. v. Croghan, 56 Pac. 164	62
In re Church Street Corporation, 299 U. S. 24, 26	2
Kerr S. S. Co. v. Radio Corporation of America, 245 N. Y. 284, 157 N. E. 140	50
Magnum Company v. Coty, 262 U. S. 150, 163	2

Moody, Governor of Texas, ex rel., United States, v. Megee, 41 F. (2d) 515 63
Munroe v. Raphael, 288 U. S. 485 ..... 63, 64
Nat. Bank v. Grand Lodge, 98 U. S. 123 55
National Lead Co. v. United States, 252 U. S. 140 40
National Savings Bank v. Ward, 100 U. S. 195 55
National Surety Co. v. United States, 129 Fed. 70 68
Pollard v. Bailey, 21 Wall. 520 39
Postmaster General v. Early, 12 Wheat. 136 44
Robins Dry Dock and Repair Co. v. Flint, et al., 275 U. S. 303 ..... 57, 77
Spinney v. United States, 32 Ct. Cl. 397 68
Sunter v. Frazer, 228 Pac. 660 59
Tullock v. Mulvane, 184 U. S. 497 65
Union Pacific R. Co. v. United States, 219 Fed. 427 36
United States v. American Surety Co., 161 Fed. 149 ..... 36, 75
United States v. Atlantic Coast Line R. Co., 215 Fed. 56 ..... 36, 47, 68
United States v. Barker, 100 Fed. 34 68
United States v. Bryan, 82 Fed. 290, 90 Fed. 473 68
United States v. Claypool, 14 Fed. 127 68
United States v. Fordyce, 122 Fed. 962 68
United States v. Griswold, 76 Pac. 596 62
United States v. Rogde, 214 Fed. 283 68
United States v. Sander, 6 McLean 598, Fed. Cas. No. 46,219 68
United States v. Smelser, 87 Fed. (2) 799 39
United States v. United States Fidelity & Guaranty Co., 247 Fed. 16 ..... 36, 39, 77
United States v. United States Lines Co., 24 Fed. Supp. 427 60
United States ex rel. Bimberg Bros. v. Globe Indemnity Co., 26 Fed. (2d) 191 61

United States ex rel. Mathews v. Massachusetts Bonding & Ins. Co., 202 N. Y. Supp. 867, 238 N. Y. 334, 144 N. E. 631 61
Washington for the Use of M'Cue v. Young, 10 Wheat. 406 ..... 13, 51–54
Western Union Telegraph Co. v. Schriver, 41 Fed. 538 44
Wilcons v. Penn. Mutual Life Ins. Co., 91 Fed. (2d) 417 39
Williams v. Wells Fargo and Company Express, 177 Fed. 352 ..... 31, 33
The Winkfield (1902) Probate (Eng.) 42, 3 B. R. C. 368, C. A. 76

STATUTES CITED.

Page

5 U. S. C. A., Sec. 22 ..... 18, 41
5 U. S. C. A., Sec. 306 33
5 U. S. C. A., Sec. 331 26
5 U. S. C. A., Sec. 366 26
5 U. S. C. A., Sec. 377 ..... 6, 12, 14, 15
5 U. S. C. A., Sec. 378 26
5 U. S. C. A., Sec. 392 ..... 11, 36
6 U. S. C. A., Secs. 4–5 26
6 U. S. C. A., Sec. 14 43
7 U. S. C. A., Sec. 249 29
11 U. S. C. A., Sec. 78(h) 29
18 U. S. C. A., Sec. 331 26
22 U. S. C. A., Sec. 78 29
22 U. S. C. A., Secs. 103, 171 29
26 U. S. C. A., Sec. 907(a) 26

26 U. S. C. A., Sec. 1204 29
28 U. S. C. A., Secs. 347, 377 (Judicial Code, Secs. 240(a), 262) 2
28 U. S. C. A., Secs. 489, 671, 737, 775 26
28 U. S. C. A., Sec. 500 29
28 U. S. C. A., Sec. 732 ..... 6, 30, 31, 33, 35
31 U. S. C. A., Secs. 44, 71, 73, 74, 112, 116, 119, 528, 773 26
31 U. S. C. A., Sec. 215 11
39 U. S. C. A., Sec. 34 ..... 12, 14, 15, 40, 42
39 U. S. C. A., Secs. 35, 36, 37, 38, 40, 44 ..... 6, 7, 8, 9
39 U. S. C. A., Secs. 36, 44–45, 49–50, 54, 62, 65–66, 163, 172, 275, 361, 731, 735, 783, 789, 822 26
39 U. S. C. A., Secs. 37, 40 48
39 U. S. C. A., Sec. 132 27
39 U. S. C. A., Sec. 696 26
39 U. S. C. A., Sec. 790 ..... 12, 36
40 U. S. C. A., Sec. 270 (Smith-Hurd Act) 29
48 U. S. C. A., Sec. 33 29
Act of June 22, 1906 (34 Stat. 438) 26
Act of June 10, 1921, Chap. 18, Sec. 304 (42 Stat. 24) 40

POSTAL REGULATIONS CITED.

Page

Postal Laws and Regulations, Sec. 10, par. 7 26
Postal Regulations, Sec. 58 36
Postal Laws and Regulations, Secs. 58, 59, 65, 105, 106, 109–111, 113, 114, 116, 117, 119–124, 126, 129, 130, 133, 134, 137-139, 142-143, 148-159, 228, 235-239, 242–250, 252–254, 257–259, 262, 263, 265–274, 276, 277, 279, 282–84, 286–292, 296, 298 24

Postal Laws and Regulations, Sec. 59(2) 12
Postal Laws and Regulations (1932 Ed.) Sec. 416... 18
Postal Regulations, Sec. 473 28
Postal Regulations, Secs. 777, 816.7–11, 32, 37, 39, 40, 45, 73
Postal Laws and Regulations, Sec. 1426 ..... 49, 78
Postal Laws and Regulations, Secs. 1860–1862 36
Postal Regulation No. 10, par. 8 37
Postal Regulation No. 13, par. 2(b) 26
Postal Regulation No. 27 26
Postal Regulation No. 66 25
Postal Regulation No. 88 26
Postal Regulation No. 233 ..... 12, 36
Postal Regulation No. 472 27

TEXTBOOKS CITED.

8 Corpus Juris Secundum, p. 371 75
6 American Jurisprudence, pp. 371, 386-387 ..... 75, 76
1 Beven, Negligence in Law (3d Ed.) 305 55
Pollock on Torts (8th Ed.) 434, 547 56

Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, a Corporation,

Petitioner,

vs.

NATIONAL SURETY CORPORATION, a Corporation, and PATRICK J. MALONE,

Respondents.

BRIEF FOR RESPONDENT NATIONAL SURETY CORPORATION.

OPINIONS BELOW.

Certiorari to the Circuit Court of Appeals of the Eighth Circuit to review an affirmance of a judgment of the District Court for the District of Minnesota dismissing plaintiff's* action. The reference on page 1 of plaintiff's brief

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NOTE: *For convenience in reference, in this brief the parties will be referred to as they were in the trial court. Unless otherwise indicated, the figures in parentheses refer to the pages of the printed record and the Italics in quotations, statutes or regulations are ours.

to the printed reports and the record setting forth the opinions delivered in the courts below is accurate.

GROUNDS OF JURISDICTION.

Jurisdiction of this Court to review the Circuit Court of Appeals is invoked under the powers conferred by Section 240 (a) and Section 262 of the Judicial Code (28 U. S. C. A., par. 347, par. 377). That power is conceded. However, a careful examination of the decisions of the courts below in this case will establish that the case is not one for the exercise of the powers conferred by the sections cited. Cf. *Magnum Company v. Coty*, 262 U. S. 159, 163; *In re Church Street Corporation*, 299 U. S. 24, 26. This writ was improvidently issued. There is no conflict between circuits. There is no question of local law. The absence of litigation on the point in the one hundred fifty years existence of the postal establishment negatives the conclusion that the question of federal law is important. No conflict with any decision of this Court, not palpably distinguished in the opinions below, is suggested. No departure from the accepted and usual course of judicial proceeding has been suggested.

STATEMENT OF THE CASE.

The following from the opinion of the Circuit Court of Appeals states the case tersely:

> "On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, without the consent of the Government, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee without the written consent of the sender?" (102)

STATEMENT OF FACTS.

The material facts are set forth by the trial court in its opinion (70-72). They may be summarized as follows:

The plaintiff, Midland Loan Finance Company, brought this action in the name of the United States but for its own use and benefit (fol. 3). The consent of the United States to the bringing of the suit was sought but not obtained (58-60). The action was against a postmaster upon his bond (18). The total alleged loss was $34,997.03 (fol. 17). The penalty of the bond was $16,000 (19). The questions sought to be reviewed were presented during trial (48) and before verdict (61-63). Ruling was reserved (fol. 78) and after verdict the action was dismissed by the trial court (fol. 83).

Plaintiff was engaged in the automobile finance business in Minneapolis, purchasing contracts of sale from automobile dealers in rural towns. One Hunting was such a dealer at Montgomery, Minnesota, where the defendant Malone was acting postmaster. Hunting from time to time

sold plaintiff conditional sales contracts, with the installment note of the purchaser, and plaintiff then and there paid Hunting for them (fol. 48). In submitting contracts and notes for sale to the plaintiff Hunting gave to plaintiff credit references of the makers of the notes and contracts. Plaintiff after its purchase of the paper addressed letters to the makers of the contracts and to the credit references at Montgomery. Hunting convinced the postmaster it was proper for him to deliver many of such letters to him (Hunting). It later developed that many of the contracts so sold by Hunting to the plaintiff and concerning which the plaintiff subsequently wrote the purported makers were spurious. Since the letters addressed to credit references and to the purported makers of forged or fictitious contracts were not returned to the plaintiff, plaintiff assumed they had been delivered to the addressees. It claimed that thereby it failed to discover the fraud practiced upon it by Hunting prior to its use of the mail, and that consequently Hunting was enabled to practice further similar frauds upon it. It was not claimed that any of the money which plaintiff lost to Hunting came into the possession of the defendant acting postmaster, or that he had any knowledge of the frauds that were being perpetrated by Hunting on the plaintiff (70-72; 103).

Acting upon motions made during trial (48; 61-63) the trial court, after verdict, dismissed the action as to the surety of the postmaster (67). From that dismissal plaintiff appealed to the Circuit Court of Appeals and its affirmance (107) is now presented for review.

From the foregoing it will be seen, and should be carefully noted, that there are four things *not* involved in this review:

(1) There is no question of the right of the plaintiff to sue the postmaster for any damage it may have suffered from any wrong committed against it by the postmaster.

(2) There is no question about the right of the United States to sue upon this bond, either in its own proper behalf or to recover on behalf of private mail users whatever has been lost in the transmission of the mails.

(3) This action is not one for the intrinsic value of property lost in the mail, but is an action for damages consequential upon misdelivery—i. e., damages occasioned by the acts of persons other than the postmaster and only claimed to have been concealed by inferences from the misdelivery.

(4) There is no question in the case about the effect of verdict, because the instructions of the Court to the jury are not in the record, and because the motion [the granting of which resulted in the judgment from which appeal is taken] was made prior to verdict, and because upon dismissal and setting aside of the judgment into which verdict was merged the verdict disappeared.

Wherever in the statement of facts made by plaintiff in its brief there is a departure from this statement of facts, it will be found either that the statement of that brief is not supported by the record or that the fact is immaterial to the question under review.

THE BOND INVOLVED.

The bond involved is set forth on page 19 of the record. In addition to the condition of it quoted on page 6 of plaintiff's brief, it names as obligee "The United States of America". The trial court considered this important (74, 77, 87), as did the Circuit Court of Appeals (103, 105), as did the Congress (5 U. S. C. A., Sec. 377). The bond names its obligee in the following language:

> "* * * * we * * * Malone * * * as principal * * * and National Surety Corporation * * * * * * as surety * * * do hereby bind ourselves * * * *to pay to the United States of America* the sum of Sixteen Thousand Dollars ($16,000.00) * * *."

THE STATUTES INVOLVED.

The statute which the Circuit Court of Appeals deemed "pertinent" (104), and which is omitted from those set forth on pages 6 and 7 of plaintiff's brief, is 28 U. S. C. A., Sec. 732, and reads as follows:

> "All suits * * * arising under the postal laws, shall be brought in the name of the United States."

The statutes in addition to those mentioned on page 7, et seq., of plaintiff's brief, from which the trial court deduced a Congressional intent and policy adverse to those contentions of plaintiff appearing on pages 93 to 119 of its brief, are quoted by that court in a footnote (75, 76), and are set forth in a footnote here.*

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* Section 35. Approval of bonds. The bonds of all postmasters may by the direction of the Postmaster General be approved and accepted, and the approval and acceptance signed by the First Assistant Postmaster General or by the Fourth Assistant Postmaster General in the name of the Postmaster General. (39 U. S. C. A., Sec. 35).

THE POSTAL REGULATIONS INVOLVED.

In addition to the Postal Regulations referred to at page 9 of plaintiff's brief, the particular Postal Regulation under which Malone acted in delivering the letters in question to Hunting is Section 777. Plaintiff quotes only the first paragraph of that section (page 10, Plaintiff's Brief), but both the trial court (72) and the Circuit Court of Appeals (104) thought that the second paragraph of this Regulation covered this case. Paragraph 2 of Section 777 reads:

> "When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. Ordinary letters bearing the word "Personal" in connection with the address shall be delivered as other mail for the addressee is delivered."

Section 36. New bonds; application of payments. Whenever any postmaster is required to execute a new bond, all payments made by him after the execution of such new bond, may, if the Postmaster General or the Comptroller General deem it just, be applied first to discharge any balance which may be due from such postmaster under his old bond. (39 U. S. C. A. Sec. 36).

Section 37. Deficiency in accounts; notice to sureties. When a deficiency shall be discovered in the accounts of any postmaster, who after the adjustment of his accounts fails, to make good such deficiency, it shall be the duty of the General Accounting Office to notify the Postmaster General of such failure, and upon receiving such notice the Postmaster General shall forthwith deposit a notice in the postoffice at Washington, District of Columbia, addressed to the sureties respectively upon the bonds of said postmaster, at the office where he or they may reside, if known; but a failure to give or mail such notice shall not discharge such surety or sureties upon such bond. (39 U. S. C. A., Sec. 37).

Another Regulation considered pertinent by both the trial court (80) and the Circuit Court of Appeals (104) and omitted by plaintiff from those summarized on pages 9 and 10 of its brief is Section 816. That section reads:

> Sec. 816. "*The* loss, rifling, damage, *wrong delivery of,* or depredation upon *registered or other mail,* and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.
>
> 2. *When* the Chief Inspector finds that *the facts ascertained* in connection with such an investigation *establish the responsibility,* by reason of fault or negligence, *of a postal employee* or mail contractor or an agent or employee thereof, *the Chief Inspector shall demand the amount of the loss from such employee* or contractor.
>
> 3. The Chief Inspector in such cases shall communicate the facts to the officer having charge of the employee or service with information of any collection made or contemplated, for consideration of the advis-

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Section 38. Vacancies; appointment of successors; period of liability on bonds; temporary appointments. **Whenever the office of any postmaster becomes vacant,** the Postmaster General or the President shall supply such vacancy without delay, and the Postmaster General shall promptly notify the General Accounting Office of the change; and every postmaster and his sureties shall be responsible under their bond for the safe-keeping of the public property of the postoffice, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in **cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibility by giving notice,** in writing, to the Postmaster General, such termination to take effect ten days after sufficient time shall have elapsed to receive a reply from the Postmaster General; and the Postmaster General may, when the exigencies of the service require, place such office in charge of a special agent until the vacancy can be regularly filled; and when

ability of imposing fine or of taking other disciplinary or corrective measures. The amount of the fine or the character of disciplinary action taken or proposed to be taken shall upon request be reported to the Chief Inspector by such officer.

4. When collection is made under the provisions of this section a receipt shall be given on a form furnished by the department showing the amount, the case number, a description of the mail, and the grounds on which the collection is based.

5. If after payment the propriety of the collection is questioned, the matter may be taken up by the person from whom the collection was made through his superior officers, but this shall be done within 30 days from the date of the collection. Any statement which it is desired to submit shall be forwarded promptly through official channels to the office having the employee or service in charge for transmission to the Chief Inspector; at the same time the officer with whom it is originally filed shall immediately notify the Chief Inspector that a statement has been submitted.

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such special agent shall have taken charge of such postoffice, the liability of the sureties of the postmaster shall cease. (39 U. S. C. A., (1939 Supp.) Sec. 38).

Section 40. Release of sureties on bond. If on the settlement of the account of any postmaster it shall appear that he is indebted to the United States, and suit therefor shall not be instituted within three years after the close of such account, the sureties on his bond shall not be liable for such indebtedness. (39 U. S. C. A., Sec. 40).

Section 44. Neglect to render accounts. Whenever any postmaster neglects to render his accounts for one month after the time, and in the form and manner prescribed by law and the regulations of the Postmaster General, he and his sureties shall forfeit and pay double the amount of the gross receipts at such office during any previous or subsequent equal period of time; and if, at the time of trial, no account has been rendered, they shall be liable to a penalty of such sum as the court and jury shall estimate to be equivalent thereto, to be recovered in an action on the bond. (39 U. S. C. A., Sec. 44).

Unless the Chief Inspector sustains the propriety of the collection, the money shall be returned. This information shall be printed on the receipt mentioned in paragraph 4.

6. *If* full recovery is not made and *the Chief Inspector determines* that further proceedings should be had, *he shall present the facts to the Solicitor* for the Post Office Department *for advice as to* the advisability of *suit by the United States for recovery of the amount involved.* Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.

7. *All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear.*

8. If the facts ascertained by the Chief Inspector establish an irregularity for which indemnity may be payable and recovery can not be made without materially delaying the settlement of the indemnity claim, he shall transmit the papers to the officer charged with consideration of such claims for certification or rejection."

The significance of this Regulation is that, if there be substance in plaintiff's claim that it be considered within the coverage of the bond in which plaintiff is not mentioned, this Regulation provides the course for plaintiff to pursue in seeking to recover.

In addition to Section 816, other Postal Regulations provide remedies to a private mail user by action within the Postoffice Department. They cover the various cases of loss that can arise through mishandling of the mails by carelessness or theft of postal employees. These regula-

tions with their interpolated statutes were helpful to the Circuit Court of Appeals in its construction of the intended coverage of the bond (106) and similarly helpful to the trial court (80). They show a complete code of administrative remedy available to plaintiff and make such suits as this needless. For its own reasons plaintiff omits them from its brief. The summary of them made by the trial Court is set out in the footnote below.*

ARGUMENT.

I. Plaintiff's Right to Sue Depends Upon Its Establishing that Congress Intended: (1) that patrons of the Post Office Department be covered by a Postmaster's Bond and (2) that such Patrons Should Have a Right to Sue in the Name of the United States without Its Consent; and (3) That such bonds should cover consequential Damages to Such Patrons.

The Postmaster General appointed defendant Malone as Acting Postmaster at Montgomery, Minnesota, and he accepted. That appointment and acceptance constituted an employment contract between Malone and the Government. The Postal Laws and Regulations enumerate the duties of

*It is evident that, by the adoption of various rules and regulations, the Government has endeavored to protect the public against the usual and normal losses that may occur on account of carelessness in the handling of the mails or otherwise. The payment of money to a postmaster on (fol. 103) postal savings, for instance, constitutes a direct obligation on the part of the Government to the patron. **Provisions are made for registering and insuring mail matter.** In Tit. 5 U. S. C. A., Sec. 392, as amended June 22, 1934, the Government has outlined a summary method of settling claims arising by reason of the negligence and misconduct of the postmaster, where the same may be settled for less than $500.00. In Tit. 31 U. S. C. A., Sec. 215,

Acting Postmasters. So, those statutes and departmental regulations became part of the employment contract between Malone and the Government and they defined his employment duties to his employer.

Collateral to that employment contract and pursuant to statute (39 U. S. C. A., Sec. 34), Malone entered into a second contract. He gave the Government the surety bond here in suit. Pursuant to statute (5 U. S. C. A., Sec. 377), that bond was "*made to and with the United States of America*", which is the only obligee named in the bond (19). The bond was conditioned as follows:

> "That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed upon him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed upon him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force." (19).

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and also found in Section 59 (2) of the Postal Laws and Regulations, the head of the department is authorized to adjust and determine any claim on account of damages to, or loss of privately owned property where the amount of the claim does not exceed $1,000.00, caused by the negligence of any officer or employe of the Government acting within the scope of his employment. The Postal Laws and Regulations under Section 59 (2) have promulgated detailed rules covering claims for such damages. Section 790, Tit. 39 U. S. C. A. and Postal Laws and Regulations No. 233 provide means whereby the postal department may distribute moneys that have been recovered through administrative action in instances where such moneys have been stolen from the United States mails. (80)

So, there are two contracts between Malone and the Government. The first and principal contract is the employment contract which defines Malone's employment duties by its reference to the laws and regulations which enumerate them. The second and collateral contract is the surety bond which is conditioned upon Malone's performances of those same duties owed to that employer.

The case at bar is an action on that surety bond. It is a contract action. It is not brought by the employer-obligee or with its assent. The question presented is whether the plaintiff has an original right to maintain this action on that collateral contract. To establish that right plaintiff, beyond showing injury, must show (1) itself to be an intended obligee of the bond and (2) a right to sue without the permission of the named obligee to use its name. Either of these two prerequisites may be shown by reference to the instrument or to the statutes calling for it. This rule is best shown by *Washington for the Use of M'Cue v. Young*, 10 Wheat. 406 (1825). That case was an action by the purchasers of a winning ticket in a lottery conducted by the City of Washington on the bond of the lottery manager. This Court held that:

> *"No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent given in fact or by legal intendment.* * * * We think upon general principles, they (i. e. plaintiffs) had no right to institute this suit without the consent of the corporation." (pp. 407-409)

That case establishes as plainly as language can indicate those two prerequisites. *First,* "no person who is not the

proprietor of an obligation can have a legal right to put it in suit, unless such right be given by legislature * * *." Applied to this case, plaintiff has no right whatever on the bond in suit unless it can establish that Congress has given it such a right. *Second*, "no person can be authorized to use the name of another, without his assent given in fact or by legal intendment." Applied to this case, that means that even if plaintiff can prove that Congress has given it a right on the bond in suit, still plaintiff cannot maintain the action in the name of the United States without further showing the express consent of the Government to use its name or consent by legal intendment.

The principles of that case, as will hereafter appear (infra, pp. 51-65) have been repeatedly and consistently applied by this Court and other courts and have never been receded from down to the present time.

The bond is to "pay to the United States." So the United States, not the plaintiff is the proprietor of the obligation. It does not by name or by description of a class refer to plaintiff. So it carries in itself no permission to plaintiff to sue upon it.

The statutes (39 U. S. C. A., Sec. 34; 5 U. S. C. A., Sec. 377) requiring the bond in suit does not expressly give private persons any rights under it. Their language suggests the contrary.* Consequently, it is incumbent upon

*39 U. S. C. A., Sec. 34: "Bond. Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

5 U. S. C. A., Sec. 377: "Form of Bonds and Contracts. All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America."

plaintiff to show that Congress has otherwise manifested an intention that plaintiff should have direct rights under the bond. By express statutory provision (28 U. S. C. A., Sec. 732), suit on the bond must be "in the name of the United States." Congress has not expressly consented to plaintiff's use of the name of the United States and the Government has refused its consent (84). Consequently, plaintiff must then establish such consent by showing inferential Congressional intention to grant such consent. It is strange that as respects these two things Congress should leave such important matters to inference and indirection. But in the absence of express provision in the bond or in statutes, or the Regulations made supplementing the statutes, that is what plaintiff is forced to do to establish the two necessary prerequisites mentioned.

In addition to these two prerequisites plaintiff must further establish that consequential damages such as are sought here are by inference from some Congressional utterance brought within the bond.

II. Factors Demonstrating that Congress Did Not Intend: (1) That Patrons of the Post Office Department Should be Covered by a Postmaster's Bond, or (2) That Such Patrons Should Have a Right to Sue in the Name of the United States Without Its Consent or (3) That such Bonds Should Cover Consequential Damages to Such Patrons.

Before discussing what the implications of the bond statutes and regulations do not show, we point out that they affirmatively show an intention that such bonds shall be put in suit only by the responsible officers of the United States.

1. *The surety contract in suit being collateral to an employment contract, the obligations under the surety contract are owed to the promisee in the employment contract—the Government.*

It is to be remembered that the surety bond upon which this action is brought is not an independent contract. Rather, it is collateral to the contract of employment between Malone and the Government. See supra, pp. 11-13.

An employee's employment duties may require him, on behalf of his employer, to deal with third persons. But the duties are *owed to the employer*. So, here Malone's duties under the principal (employment) contract required him to deal, on behalf of the Government, with patrons of the Government's postal service. But Malone's duties under that employment contract were owed to the Government, and not to its patrons. So, the surety contract in suit being collateral to the employment contract and the conditions of the surety bond being generally to perform the duties imposed on the employee-obligor by his employment contract with the obligee, and those duties being owed to the employer-obligee rather than to its patrons, it is plain that the purpose of the collateral surety contract is to secure *to the employer-obligee* the performance of those duties. That being so, it is equally plain that the obligations of the employee-obligor under the surety contract are owing to the employer-obligee, and not to its patrons. It follows, then, that the obligations of the surety likewise are to the Government, and not to its patrons.

2. *Upon familiar principles, the conditions of the bond indicate that it refers to duties owed to the Government rather than to patrons of the post office.*

The condition of the bond is as follows:

> "Now the Condition of This Obligation Is, That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force." (19).

The bond is conditioned upon the performance by Malone of three kinds of duties, viz., (1) as acting postmaster, (2) as fiscal agent of the Government, and (3) with reference to the Postal Savings System. Malone's duties in the second and third categories are obviously duties owing to the Government rather than third persons and have reference to the protection of the money and property of the Government. Construing by the rule *ejusdem generis*, it must be that Malone's "duties as acting postmaster" are also Governmental duties. Plaintiff claims that the language referring to "all duties" is the language that imparts plaintiff's right to bring this suit. (Pltf. Br., pp. 66, 72, 94, 112-113). If that be so, then the remaining two conditions of

the bond are not necessary. They become surplusage. The only way they can be given effect is to treat them as definition or explanation or illustration of the general language. The specific conditions (fiscal agent and Postal Savings) demonstrate that the general conditional duties as acting postmaster likewise refer to performance of duties owed to the Government.

Congress has provided:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." (5 U. S. C. A., Sec. 22).

Under that statute, and in the absence of any statute defining the duties of an "acting postmaster," we must look to the regulations of the Post Office Department to ascertain them. They are set out in the *Postal Laws and Regulations*, (1932 ed.), Sec. 416, as follows:

> "Whenever the office of a postmaster becomes vacant, through death, resignation or removal, the Postmaster General shall designate some person to *act as postmaster* until a regular appointment can be made * * *. *The postmaster so appointed shall be responsible under his bond for the safekeeping of the public property pertaining to the postoffice and the performance of the duties of his office* until a regular postmaster has been duly appointed and qualified and has *taken possession of the office.* * * *"

The other "duties of his office" as acting postmaster are nowhere defined. In the above quoted regulation, the single

duty specifically enjoined upon an acting postmaster and specifically addressed to his responsibility under his bond is "the safekeeping of the public property pertaining to the postoffice." That is a duty owed to the Government. The reference to the remaining "duties of his office" must likewise be taken as referring to duties owed to the Government rather than to patrons of the postal service. Otherwise the reference to the safekeeping of the public property becomes surplusage. (Among such duties is the protection of the Government's possessory interest in letters in its custody,—i. e. its special property as bailee of the letters. See pp. 75-76, infra.) No other "duties as acting postmaster" are defined.

So by the Regulations' definitions of the duties of acting postmaster the three conditions of the bond become four. Of the four, three specifically relate to duties owed the Government. The fourth is "duties of his office." Those duties are not elsewhere or otherwise defined. If the bond be paraphrased by substituting definitions for terms it is "to pay the United States conditioned upon Malone's performance of the duties of his office." That clearly means his duties to the United States.

To illustrate how plainly one must be designated by a bond or a statute in order to acquire a right to sue on the bond, even though he be incidentally benefited by it, the case of *Fosmire v. National Surety Company*, (1920) 229 N. Y. 44, 127 N. E. 472 is instructive. That was an action by a laborer upon the bond of a highway contractor. The bond was furnished pursuant to a statute requiring that it be conditioned for the payment of any direct or indirect damage claimed on account of the construction. The bond ran to the People of the State of New York and was conditioned that the principal should properly perform the con-

tract within the time limited and protect the State against damages growing out of the doing of the work "and if the above bounden principal * * * shall * * * pay in full the wages stipulated and agreed to be paid to each and every laborer employed by the said principal or by his agents, then this obligation shall be null and void." The Court will observe that the separate condition of the bond, apart from the condition to indemnify the State against damages, was to pay the very wages for which suit was brought. The New York Court of Appeals denied recovery. The late Mr. Justice Cardozo, in the course of the opinion, said:

> "*We think the cause of action is in favor of the people solely.* * * * In so holding, we put our decision upon the single ground that the bond, read in its entirety, is inconsistent with an intention that the plaintiff and others in like position should have the right to sue upon it. * * * A different question would be here if the bond had been conditioned for the payment of wages and nothing else. The interest of the state in the welfare of those who labor on its public works might then point to an intention to create a cause of action in their favor. * * * *The dominant purpose of this bond was protection to the state.* That is plain alike from its terms and from those of the statute which required that security be given (Highway Law, supra). This dominant purpose will be defeated if laborers may ignore the people, and sue in their own right.
>
> * * *
>
> "The plaintiff fails, therefore, to establish that he and his fellow laborers were the donees of a right to sue. * * * The concession of such a right would do more than frustrate the purpose of the bond. It would frustrate the purpose of the statute which directed that a bond be given. The statute does not per-

mit, and the commission in exacting the bond did not intend, that the security should be exhausted at the instance and for the benefit of persons other than the state itself. *What the defendant's liability would be if the action were prosecuted by the people we need not now determine.* That question is not here. (pp. 473-474) (127 N. E. 472).

The plaintiff in the case at bar is not mentioned in the bond. The plaintiff in the *Fosmire* case was, but could not sue. There being no right at common law to maintain this action, such right must be conferred by statute. But plaintiff has not indicated any such statute.

3. *The interest of the Government in the protection of its own money and property in the hands of postmasters forbids a construction which permits exhaustion of the Government's security by private persons.*

Postmasters are in possession of large sums of Government money. The importance to the Government of securing itself against the loss of such sums is evident. Indeed, plaintiff has at no time denied that the protection of the Government against loss of its money in the hands of its postmasters was the primary purpose of Congress in requiring bonds from its postmasters. However, plaintiff seeks to keep a foot in the door as a "secondary" or "subordinate beneficiary" of those bonds (Pltfs. Br., pp. 58-61). At the same time, plaintiff dismisses without any attempt at solution the intensely practical and important problem of determining how the Government's admittedly

primary interest is to be secured if private persons like the plaintiff have a right to sue on such a bond without even the consent of the Government to the use of its name. If plaintiff's position be adopted, no protection is left the Government in a case where a private action like the one at bar has completely exhausted the penalty of the bond. Any rule respecting the protection of the Government under these bonds must be general in its application. It is no answer to say, as plaintiff says, that no priorities between the Government and private claimants are involved in this particular case and that a solution of that problem may await a future case (Pltf. Br. pp. 3-4, 25, 56-57). Moreover, none of plaintiff's statements about the priorities here includes any reference to the record. Nothing in the record warrants such statements. Nothing in the record discloses whether the Government has a claim on this bond or not. Neither is it any answer to say, as plaintiff asserts, that the Government has taken a new bond from Malone as postmaster (Pltf. Br., pp. 25, 56). The new bond does not secure the performance of Malone's duties as *acting* postmaster, as does the bond in suit. That new bond begins only where the coverage of this bond ends. There is no escape from the fact that establishment of any right in plaintiff under the bond in suit will be at the expense of the Government for whose protection the bond was taken. Certainly such a result cannot be reached by "legal intendment". It is not reasonable to suppose that Congress intended that the protection of the Government under its postmasters' bonds should depend upon a race to the Court House.

Plaintiff's argument about "primary" and "secondary" "*beneficiaries*" of the bond is without basis. Neither the bond nor the statute so classifies its beneficiaries. The Circuit Court of Appeals and the trial court in this case and this Court in the *Howard* case (184 U. S. 676), all spoke of the "primary" *purpose* of the bonds. The Circuit Court of Appeals in this case and the Court in the *Foxmire* case spoke of the "dominant" *purpose* of the bond. All were seeking intent of the parties from their purpose. Once that intent was ascertained, the beneficiary and obligee were ascertained, and the purpose was no longer material. Neither court undertook to classify beneficiaries, or to hold that some secondary beneficiaries can sue when ascertained in part (no one in this case knows whether other misdeliveries occurred) without notice to the others. This idea of a hierarchy of *beneficiaries*, classified as are the creditors of a bankrupt, made up of unidentifiable grades and persons, finds no basis in the statute (none is suggested), or in the Regulations (none is suggested), or in the language of the bond (none is suggested), or in the language of any court (the opinions refer to "primary" *purpose*). Such classification of *beneficiaries* is purely a product of plaintiff's imagination. But unless such classification be imagined, then the Government's rights under the bond it required of its employee depend, according to plaintiff, upon the celerity with which it not only starts suit, but pursues it to judgment and collection. And plaintiff's rights would depend on its celerity against others. If, as plaintiff says, the consent of the Government is unnecessary to plaintiff's private suit, then no notice to the Government is necessary. So plaintiff, and others like it, could

sue without knowledge of the Government, and the Government would never know which postmasters' bonds had been exhausted by private suitors and which were still effective. Common sense forbids the finding of any such statutory purpose or intendment.

Plaintiff's brief (pp. 7-10) refers to certain statutes and regulations under which postmasters owe to the United States the duty to care for mail matter coming into their custody. From this plaintiff argues that the bond condition referring to "all duties and trusts" imposed by law or regulation is for the direct benefit of mail users. It is impractical to set forth all duties and trusts imposed by regulation or law upon postmasters. There are numerous statutes defining them. The Postal Regulations comprise 2,364 sections. Of the first 300 sections of those Regulations, 88 define, refer to or regulate postmasters in their care and custody of Government money and property (as distinguished from transactions with patrons of the Post Office) and in stating their accounts to the Government. Many of these 88 Regulations are divided into subsections and those therefore define more than one "duty and trust" of the postmaster with respect to Government money and property and accounts. The paragraph numbers of the Postal Regulations containing such references are given in the footnote below.*

In the course of the 2,364 Regulations and their definitions of postmasters' duties to the Government, numerous

*Postal Laws and Regulations: Secs. 58, 59, 65, 105, 106, 109-111, 113, 114, 116, 117, 119-124, 126, 129, 130, 133, 134, 137-139, 142-143, 148-159, 228, 235-239, 242-250, 252-254, 257-259, 262, 263, 265-274, 276, 277, 279, 282-284, 286-292, 296, 298.

references occur to Acts of Congress defining postmasters' duties in the care of Government money and property and in the stating of their accounts to the Government. In the first 300 of the 2,364 Regulations reference is made to 40 different sections of Statutes which define "duties and trusts" imposed by law upon the postmaster in the care of Government property rather than in the care of the affairs of postal patrons. References to those sections of the statute are made in the footnote below.* It is unnecessary to pursue the Regulations and statutes further. It abundantly appears that "the trusts and duties imposed by law or the Regulations" are those owed the Government. Those by the performance of which postal patrons may collaterally benefit are also owed the Government.

Two or three Regulations defining the obligations of bonds and the circumstances under which they shall be required of other employees of the postal establishment are significant for the light they throw upon the duties and trusts referred to in the condition of the bond in the case at bar.

The condition in the bond of the postmaster here in suit is defined by statute and regulation. Regulation No. 66 provides:

> "In addition to the postal employees in * * * the postal service required to give bond under specific provisions of law the Postmaster General may, *whenever he deems it to the best interests of the Government*, require any other person employed in * * * the postal

*5 U. S. C. A., Sec. 331; 5 U. S. C. A., Sec. 378; 6 U. S. C. A., Sec. 4-5; 18 U. S. C. A., Sec. 331; 26 U. S. C. A., Sec. 907(a); 28 U. S. C. A., Secs. 489, 671, 737, 775; 31 U. S. C. A., Secs. 44, 71, 73, 74, 112, 116, 119, 528, 773; 39 U. S. C. A., Secs. 36, 41-45, 49-50, 54, 62, 65-66, 168, 172, 275, 361, 731, 735, 783, 789, 822.

service to give bond to the United States in such form * * * as he shall prescribe."

The circumstance which shall require these bonds is "the best interests of the Government", not the desires or needs of postal patrons. And the employees to whom that test is applied may be handling patron's mail,—e. g. special delivery messengers.

The Act of Congress of June 22, 1906 (34 Stat. 438), embodied in Regulation No. 13, par. 2(b), provides that the Superintendent of Finance of the Postal Department shall give bond in such amount as the Postmaster General shall determine "for the faithful discharge of his duties". The duties of the Superintendent of Finance are obviously duties to the Government. He has no contact with postal patrons. Yet the statutory condition of his bond is similar to that in suit.

A similar bond is required of the Purchasing Agent of the Postoffice Department by Regulation No. 88 and 5 U. S. C. A., Sec. 366, who has no contact with patrons' mail.

Regulation 10, par. 7, defines some of the duties of the Disbursing Clerk of the Postoffice Department and requires that he shall give bond for the discharge of certain fiscal duties "and for the faithful discharge of the duties of his office according to law". The phrase is similar to that in the condition in the bond in the case at bar. The duties embraced in it are obviously duties owing to the Government and not to any postal patron.

The Act of Congress (39 U. S. C. A., Sec. 686) embodied in Postal Regulation No. 27 is "whenever a post office inspector is required to collect or disburse any public money, he shall, before entering upon such duty, give bond in such

sum and form, and with such security, as the Postmaster General may approve". The Congressional intent that the bonds of inspectors shall be for the purpose of safeguarding public money and that only is apparent. The duties of postal inspectors with reference to postal patrons are numerous and defined by regulations, but with respect to them Congress requires no bond.

The Act of Congress (39 U. S. C. A., Sec. 132) embodied in Regulation No. 472 refers to such post offices as the defendant Malone had in charge. Its pertinent parts are:

> "Assistant postmasters * * * at * * * third-class post offices, and *when deemed necessary by the Postmaster General for the better protection of the interests of the Government any other employees* in such offices, shall, * * * give bond to the United States * * * in such penalty as the Postmaster General shall prescribe, *conditioned for the faithful discharge of all duties and trusts imposed upon them either by law or the rules and regulations of the Post Office Department.*"

Assistant postmasters and other employees in post offices have as much to do with the mail of postal patrons as have postmasters. As to other employees of a third-class post office when a bond is required of them, the statutory condition of such bond is precisely and verbatim the condition of the bond in the case at bar. But the test of the circumstances which may require such a bond with that condition is defined by Congress to be "when deemed necessary by the Postmaster General for the better protection of the interests of the Government". It is thus seen that the Congress in exacting bonds of employees who have the same duties respecting the patron's mail as had Malone

as acting postmaster, looked only to the interests of the Government.

Regulations, Sec. 473, implements the foregoing statute. It provides that the bonds will be given to the United States by employees of the Post Office to cover "the faithful discharge of all duties and trusts imposed upon them" and "due accounting of all moneys." It further provides that the amount of the bond shall be in accordance with the "financial responsibility". It further provides that when the "financial responsibility" be increased, the bond shall be increased. The "financial responsibility" referred to is obviously the duty owed the Government and not the postal patrons by the employees in question. This is emphasized by subparagraph 6 of that Regulation which provides:

> "It shall be the duty of postmasters at * * * third-class post offices to see that only clerks and employees who are under bond are permitted to handle money, stamps, registered mail and other valuable matter."

Similar provisions appear in subparagraph 7 of the same Regulation. They make it appear that the purpose of the bond is to protect the money, stamps, etc., of the United States. All of these bonds are of course to be conditioned as required by the foregoing statute. The condition is the same as the case at bar. It is exacted only when the best interests of the Government require it.

It is thus apparent that the numerous Acts of Congress requiring postal bonds with similar conditions to that of the case at bar have no reference to the postal patrons except as they may be incidentally benefited by the performance of Governmental duties. The "better protection of the

interests of the Government" is the Congressional expression of purpose in requiring bonds of mail handlers.

4. *Omission of Congress to expressly provide for suit by private persons on Post Office bonds indicates its intention to grant no such right, since Congress has made express provision for such suits upon other kinds of bonds.*

When Congress required that the bond in this case be "made to and with" the United States, it acted in full knowledge that many users of the mails would be affected by postal employees' deviations from the Postal Laws and Regulations. Its failure, then, to provide that such users might sue upon postal bonds must be taken to be more than an inadvertent omission or a reliance upon implication. It must be recognized as a deliberate reliance by Congress upon the common law which denied such third persons a right to sue on surety bonds when not named or designated as obligees. This follows from the fact that when Congress, in dealing with other statutory bonds, has intended that third persons should be able to sue thereon, it has expressly so provided. Illustrations are the statutes requiring bonds of bankruptcy referees, receivers, trustees and designated depositaries (11 U. S. C. A., Sec. 78(h), United States marshals (28 U. S. C. A., Sec. 500), materialmen on public contracts (Smith-Hurd Act, 40 U. S. C. A., Sec. 270), consular officers (22 U. S. C. A., Sec. 103), warehousemen (7 U. S. C. A., Sec. 249), marshals of consular courts (22 U. S. C. A., Sec. 171), officers wrongfully destroying distiller's property (26 U. S. C. A., Sec. 1204), notaries public (48 U. S. C. A., Sec. 33), consular officers representing decedents or incompetents (22 U. S. C. A., Sec. 78), and

so on. The absence of any provision expressly granting to private persons the right to sue on Post Office bonds, taken with the repeated enactment of express statutes over a long series of years when it was the intention of Congress to grant such right, demonstrates the absence of that intention here. The departure from practice shows the purpose.

5. *Suit must be in name of United States.*

In addition to the foregoing manifestations of the Congressional intention that private parties should have no original rights under Post Office bonds and that they should have no right to sue thereon, Congress has expressly provided that "* * * all suits arising under the postal laws shall be brought in the name of the United States" (28 U. S. C. A., Sec. 732). Plaintiff has recognized the application of that statute to the instant case by its attempt to appropriate the name of the Government to its personal use in bringing this action.

Implications of that statute are not difficult to discern. Even in a case where private persons had substantive rights under an official's bond and a right to sue thereon after permission granted, the action "was brought * * * in the name of the United States, at the relation and to the use of David D. Stewart" (*Howard v. United States* (1902) 184 U. S. 676, 680) although no statute expressly required that action to be brought in the name of the Government. The enactment, then, of such a statute indicates that the Congress intended to require something additional in cases like the one at bar to which it expressly applies. The fair inference must be that Congress, by enacting such an addi-

tional requirement for this case, specified that the rights to be enforced under a postal bond should belong to the Government and that the Government alone should have a right to sue. The quoted statute was construed in *Williams v. Wells Fargo and Company Express* (C. C. A. 8-1910) 177 Fed. 352. That action was by an "informer in his own behalf and on behalf of the United States" (p. 353) to recover a penalty arising under the Postal Laws. Since the quoted section (28 U. S. C. A., Sec. 732) forms a part of the procedural act of the federal courts and by its express terms commands that all such suits shall be brought "in the name of the United States", the court held that "no other person than the United States may bring and prosecute" it (p. 356). This statute and construction are both sound and practical in their application here. Otherwise, the obligee named in the bond might sue as defendant its own employee whom, on investigation, it has already found blameless. It is apparent that no legal intendment that plaintiff should have the right to appropriate the name of the United States to plaintiff's personal use and to sue on this bond can be spelled out of that situation.

This statute (28 U. S. C. A., Sec. 732) does more than manifest a Congressional intention contrary to plaintiff's suggestion. It does more than suggest that "the law making power in its wisdom deemed wise that the lawfully constituted authorities of the government should act on their official responsibility in cases" (177 Fed. 352, 356) arising under bonds "made to and with the United States". It prohibits this action.

The statute (28 U. S. C. A., Sec. 732) in full reads:

> "All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or for-

> feiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States."

Reading it shows that it refers to three kinds of cases: (a) all suits to recover duties, taxes, and imposts; (b) those suits which are to recover penalties under certain described Acts; and (c) all suits arising under the postal laws.

If this be a suit arising under the postal laws, then this statute applies. This is a suit under the postal laws. The plaintiff so averred in his complaint commencing the action (4). Otherwise there would be no Federal jurisdiction, since the plaintiff and defendant Malone are both Minnesotans. So if it be decided that this be not a case "arising under the postal laws", there is nothing to do but to dismiss for want of Federal jurisdiction. But this plaintiff claims his right to sue this surety is given (a) by the implications or construction of the Federal statutes defining the obligee of such bonds, (b) by the implications or construction of Federal statutes defining the coverage of such bonds, and (c) by reason of the principal's wrong on the plaintiff, which plaintiff says consisted of violations of Federal statutes and of Postal Regulation Section 777 (2), as plaintiff construes it. See *Howard v. United States*, 184 U. S. 672, 681.

Therefore, since the case arises "under the postal laws", this statute governs it. Since the statute governs, then the suit must be brought "in the name of the United States". The only judicial construction which those words of this statute have received is that "the lawmaking power, in its

wisdom, deemed wise that the lawfully constituted authorities of the government should act on their official responsibility in cases of violation of the postal laws", and that those words mean "by the United States". *Williams v. Wells Fargo & Co. Express* (C. C. A. 8-1910) 177 Fed. 352, 356.

To meet the effect of this statute, plaintiff suggests (Pltf. Br., pp. 150, 151): (a) that the statute applies only to suits for penalties and that this is not such a suit, and (b) that this suit is brought by it "in the name of the United States".

As to (a). To be sure, this is not a suit for a penalty. But the statute does not refer only to suits for penalties. Of the three kinds of suits it refers to, one kind relates to certain suits for certain penalties. The other two kinds have nothing to do with penalties. That is perfectly plain, as a reading of the statute will disclose.

As to (b). If to bring a suit in the name of the United States against the will of the United States is to comply with the statute, then the statute is meaningless. The Attorney General refused to bring the suit. He is the officer charged by law with the bringing of suits in which the United States is involved. (5 U. S. C. A., Sec. 306). No officer of the United States ever consented to plaintiff's use of the Government's name. On the contrary, such consent was requested (59) and refused (84). The plain purpose of the provision is to keep such suits under official control. That purpose is subverted by this plaintiff's construction. If "all suits arising under the postal laws" (28 U. S. C. A., Sec. 732) may be brought by private persons usurping the name of the United States, so may "all suits

for the recovery of any duties, imposts, or taxes, * * * or for the enforcement of any penalty or forfeiture provided by any act respecting * * * the internal revenue" (Ibid). So may actions in the nature of quo warranto. The grouping by this statute of cases arising under the postal laws together with cases to recover taxes or penalties shows the Congressional conception of them all as similar, and shows that the words "in the name of the United States" mean "by the United States". Just as any ordinary person would think. That statute *prohibits* this action.

At one time plaintiff thought so. But it now contends that Congress impliedly has given postal patrons a right to sue on the Government's bond so that any other consent of the Government to the use of its name by plaintiff, is unnecessary. Yet, plaintiff labors to explain the "Government's attitude" (Pltf. Br., pp. 10-12). If plaintiff's present contention were sound, the "Government's attitude" would be immaterial.

Furthermore, doubt as to plaintiff's good faith in its present argument is necessarily created by its prior conduct. Although the complaint is dated July 14, 1936 (18), it was not served until October 5, 1936. But, on "July 15, 1936, counsel for plaintiff wrote to the *Attorney General* a request for authorization to commence the suit (59)." (Pltf. Br., p. 11). The explanation by plaintiff's counsel of the reply to that request falls somewhat short of complete candor (57-61). In fact, it is not at all a "reply by the Attorney General," but rather it is "a letter from the Department of Justice" (author unknown or at least unidentified) "dated September 22, 1936" (58) upon which plaintiff now

relies to convince this Court of the "Government's attitude toward suit" (Pltf. Br., p. 11).

There is neither allegation, nor proof, nor finding that the Attorney General ever consented to plaintiff's usurpation of the Government's name in this suit, or that he ever indicated that such consent was not necessary to enable plaintiff to maintain this action. The trial court found that "the Government has refused to give its consent to the bringing of this suit," and the United States District Attorney as *amicus curiae* filed a brief "in support of the defendant surety company's position that the plaintiff had no right to bring this action on this bond" (84). It is neither necessary nor proper to follow plaintiff outside the record discussing the District Attorney's brief. There should be no more consumption of time or paper attempting to define the "Government's attitude toward suit." The Government's action defines its attitude. Plaintiff's conduct in requesting the consent of the Government to the maintenance of this action is an actual construction by plaintiff of the statutes which it now seeks this Court to otherwise construe. Plaintiff's conduct compels a suspicion that its present contention (that Congress impliedly has given it a right to sue and that actual consent of the Government is unnecessary) has been born since July 15, 1936, and was sired by necessity.

At all events the statute (28 U. S. C. A., Sec. 732) is not met.

6. The Postal Regulations provide an exclusive remedy for plaintiff.

The statute (5 U. S. C. A., Sec. 392) and the Postal Regulations (Sec. 58) made pursuant to it, provide a summary method of settlement by the Postmaster General of all claims arising from negligence or misconduct of postal employees, including such claims as he once here made, that can be settled for less than $500.00 The settlement is made by administrative action within the department and covers all simple claims of every kind. The individual items of claim here asserted by plaintiff fall well within this authority.

For claims against railways for damages for losses in the mails, certain other Regulations are provided. (Postal Laws and Regulations, Sec. 1860-1862). Although these Regulations do not state that they shall be the exclusive remedy, the courts have held that they are, and that the administrative action which they provide is the only remedy either of the user of the mails or of the United States, whether suing in its own behalf or for the ultimate benefit of the user of the mails. *United States v. Atlantic Coast Line R. Co.* (C. C. A., 4—1914) 215 Fed. 56; *Union Pacific R. Co. v. United States* (C. C. A., 8—1915) 219 Fed. 427, particularly page 437; *United States v. United States Fidelity & Guaranty Co.*, (C. C. A., 6—1918) 247 Fed. 16, 19.

By statute (39 U. S. C. A., Sec. 790) and Sec 233, of the Postal Regulations, provision is made for the Post Office Department distributing among the persons entitled thereto any moneys stolen from the mails and recovered by the Department through administrative action. This statute and Regulation very clearly contemplate that the United States

shall bring the suit to recover moneys stolen from the mails, whether by Postmasters or other postal employees, no matter whose money it was and regardless of the fixed liability of the Government to the private mail user. Were it not for this statute, the money received would not be in the hands of the Post Office Department for distribution among the "proper persons or owners to whom the moneys shall be restored" as specified by the Regulations, but would come direct to the hands of those persons or owners by their suit on the bond, if plaintiff's contentions are correct.

The statute or regulations last mentioned do not cover cases like this, i. e., damages arising through alleged negligence of postal employees as distinguished from theft of mail or its contents by such employees. However, *Section 816 of the Postal Regulations specifically covers loss by misdelivery.* It provides for suit by the United States and the distribution by the administrative officers of the Post Office Department among the persons damnified by "the loss, rifling, damage, *wrong delivery of,* or depredation upon registered or *other mail,* and the failure to collect or remit C. O. D. funds." This section is sufficiently broad, and no need exists for plaintiff to ignore the Regulations and invoke the aid of a court to seek redress for its claimed losses. This view is well sustained by Sec. 10 (8) of the Postal Laws and Regulations, defining the duties of the Solicitor of the Post Office Department, which include advice to the Postmaster General respecting claims for damage done to persons or property by or through the operations of the Post Office Department and questions of law or relating to prosecutions or suit affecting or arising out of the Postal Service. Certainly this grant of authority includes suits upon bonds such as we have here, as well as claims

arising from the matters specified in Sec. 816 of the Postal Regulations.

These and similar interconnected statutes and regulations adopted pursuant thereto comprise a consistent whole. They provide the means and the method whereby the Postal Department can handle the many claims arising from the use of the mails. In addition they provide for recovery and ultimate distribution among the persons found entitled thereto of the proceeds of official bonds to cover losses, whether they arise through the negligence or other fault of a mail contractor, or through the fault; negligence or misdelivery of mails by a postal employee. In all such instances adminstrative action is provided, and no intendment can be claimed that court action by private mail users such as we have here was ever contemplated.

The same considerations as moved the court in the *Atlantic Coast Line* case, supra, and the *Union Pacific* case, supra, in arriving at the conclusion that where regulations covered the subject-matter of a claim and provided a remedy, that remedy must be taken to be the exclusive one, even though the regulation did not so state, should move this Court to the conclusion that the remedy provided by the Postal Regulations above referred to is the exclusive one, and that court action to procure the same result is an unwarranted interference with the functioning of the Post Office Department. Any other conclusion would create an anomolous situation; the statutes and regulations set up to provide administrative relief in every class of claim arising out of the handling of the mails, would be set at naught and the clear intent of relief by administrative action ignored.

These views are well stated in *Globe Newspaper Co. v. Walker* (1907), 210 U. S. 356, where this Court, considering the federal copyright laws and the remedies provided thereby, quoting from Pollard v. Bailey, 21 Wall. 520 said:

> "A general liability created by statute without a remedy may be enforced by an appropriate common law action, but where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

See also *United States v. U. S. F. & G. Co.* (C. C. A. 6—1918), 247 Fed. 16; *United States v. Smelser* (C. C. A. 5—1937), 87 Fed. (2) 799; *Dunn v. O'Connor* (C. A., Dist. of Columbia, 1937), 89 Fed. (2) 820; *Wilcons v. Penn Mutual Life Ins. Co.* (C. C. A. 10—1937), 91 Fed. (2) 417.

Confronted with the established and exclusive administrative procedure for recovering losses such as this the necessities of plaintiff's case compel it to deny that Section 816 is the exclusive remedy for its claimed loss (Pltf. Br., pp. 158-161). Plaintiff begs the question in this litigation by arguing that "Sec. 816, having been adopted by a mere administrative department of the Government, could not limit a *right to sue given by Congress* * * *." The existence of such a right to sue is a basic question in this case—but plaintiff's argument assumes the existence of such right. And such a right, of course, must be "given by Congress" —but plaintiff assumes it has been given without indicating the Congressional action which conferred that right.

The history of Section 816 clearly demonstrates the Congressional sanction under which it has existed for fifty years since 1872. The Post Office Department has issued, from time to time, printed regulations. It is believed that

the substance of what is now Sec. 816, Postal Laws and Regulations (1932), was included in the codification and revision of the postal regulations which were prepared in the early 1890's under the supervision of the then Solicitor for the Post Office Department, H. H. Glassie. In 1913, Congress affirmatively recognized the existence of those regulations and the operation of the postal service under them, by specifically authorizing the printing and publication of them. What is now Section 816 was included in the Congressionally authorized 1913 compilation as Section 144. Thereafter Congress revised the Postal Laws in 1921. (Act of June 10, 1921, Chap. 18, Sec. 304, 42 Stat. 24). It did not change that regulation.

It is presumed that when the Congress legislates it does so with knowledge of the state of prior and existing usages and laws with respect to the subject of its legislation. *National Lead Co. v. United States*, (1919) 252 U. S. 140, 147. When Congress codified, revised, and *re-enacted* the postal laws (including the bond statutes) in 1921 (39 U. S. C. A., Sec. 34; Act. June 10, 1921, Chap. 18, Sec. 304, 42 Stat. 29), it did so with knowledge of the then operation of the Post Office Department under the Regulations of 1913 (including Sec. 144—now Sec. 816). That demonstrates the Congressional approval of the Department's practice—now established for nearly a half century—of regarding the present Section 816 as the sole remedy available to postal patrons for losses of the type claimed by the plaintiff. Compare *Helvering v. Winmill*, (1938) 305 U. S. 79, 82-83. Congress has twice repeated that sanction by authorizing the printing of the revised Regulations again in 1924 (see Sections 134 and 635) and still again in 1932 (see Section 816).

The statutory authority granted to the Postmaster Gen-

eral (5 U. S. C. A., Sec. 22) and the Regulations promulgated pursuant thereto are of long standing and have been sanctioned by Congress. They provide an efficient administrative remedy in proper cases and must be taken to be the only path open to this plaintiff.

7. *Registry, insurance, and other provisions for the protection of mail users evidence the intention of Congress that postmaster's bonds should be for the exclusive protection of the Government.*

As pointed out by the trial court (80), supra, (footnote p. 11), extensive and express provisions for the protection of postal patrons make it evident that the mail user was not the forgotten man in the Congressional considerations of the operation of the postal service. So does the quotation on page 105 of plaintiff's brief. It is plain that adequate, express provision has been made for postal patrons without resorting to the surety bonds which are for the protection of the Government. The above provisions for the protection of postal patrons leave nothing to implication. What warrant, then, is there for assuming that Congress acted otherwise with respect to the employee's bonds and left to judicial inference as "legal intendment" a supposed right of such patrons to sue on the employees' bonds? It is more reasonable to suppose that if the Congress had intended postal patrons to have any rights under such bonds, it would have been as explicit in manifesting that intention as it was in expressing its intention that the provisions noted above by the trial court should operate for the protection of the patrons.

8. *The absence of any relation between the penalties of postmaster's bonds and the possible consequential damage to patrons from the loss of mail evidence a lack of intention that such patrons and losses be covered by the bonds.*

The statute requires that postmaster's bonds shall be "in such penalty as the Postmaster General shall deem sufficient" (39 U. S. C. A., Sec. 34). It cannot be supposed that the Congress has not known that the penalties deemed sufficient by the Postmaster General are but a small fraction of the penalties which would be necessary if postmaster's bonds were to cover not only the Government's property in the hands of postmasters, but also the value of all contents of all mail matter, and in addition the value of all contracts, bargains, marriages, social and business engagements, and the infinite matters and events which are consummated by use of the mails. Yet it is to recover the value of the latter kind of benefit that this action is brought. Certainly Congress has known that the Postmaster General was not requiring penalties sufficient to protect mail users against such losses. That being so, the failure of Congress itself to establish the penalties of postmaster's bonds strongly suggests that Congress has never intended that they should cover such losses. In this very case a $34,000 loss is claimed of a third-class postmaster in a town of one thousand population. The Postmaster General had required a bond of $16,000 to cover the Government's money and property. The failure of Congress itself to require larger bonds when the Postmaster General was setting penalties on the basis of the amount of Government property to be protected, indicates that Congress intended the bonds to be a protection against losses to the Government only.

9. *Failure of Congress to adjust premiums to increased liability claimed by plaintiff indicates no intention to impose such liability.*

The statute fixes the premiums payable for the bond (6 U. S. C. A., Sec. 14). It has been at the same rate for thirty years. The rate does not bear any apparent relation to the hazards of liability such as plaintiff claims. The rate of premium can, however, be considered as roughly proportionate to the government money and property coming into the hands of various grades of postmasters. If liability such as plaintiff claims really was intended, one would expect the premium rate to increase as has commerce and consequent hazard in the past thirty years.

10. *Plaintiff's Claim is without Precedent and Inconsistent with the Understanding of the Profession and the Practice of the Government for a Century and a Half.*

Plaintiff's brief cites 166 cases from this country, Canada, and England. Plaintiff's research goes as far back as 1633 (Pltf. Br., p. 100). But, plaintiff's brief is barren of any reference to any adjudicated case anywhere imposing upon any postal employe any liability to his employer or anyone else under his bond for any consequential damages such as it claims. Defendant's counsel has been unable, after diligent search, to discover any such case. In the light of the uncalculated but certainly considerable number of letters which have been delayed, misdelivered, or lost in the three centuries of the operation of the English and American postal services, it is significant that there is no trace of any claim such as plaintiff's ever having been sustained. Plain-

tiff's research does not disclose when the first postmaster's bonds were furnished, but *Postmaster General v. Early*, (1827) 12 Wheat. 136, 151, indicates that they were taken, if not required, prior to 1799, and that case recognizes that "they are for money due to the United States" (p. 152). Nearly a century and one-half of opportunity for this kind of a claim to arise in this country has produced no case to establish plaintiff's claim. The absence of such a case over so prolonged a period of time and in the midst of a countless number of transactions which could give rise to such a claim strongly indicates that there is no basis for such a claim. The "strong presumption" recognized in *Western Union Telegraph Co. v. Schriver*, (C. C. A. 8—1905) 141 Fed. 538, is particularly applicable here. There, the court said:

> "No authority is cited by Mr. Thompson, the diligence of counsel has presented, and our research has discovered, no decision of any court, except the judgment of the court now under review, which has ever sustained an action or a judgment against a telegraph company for loss inflicted upon the undisclosed principal of an addressee by reason of the negligence of the telegraph company in handling the message. This pregnant fact raises a strong presumption that, when this message was received and transmitted, it was not the law that the company was liable for negligence to the undisclosed principal of the addressee. If it had been judgments founded upon it would probably not have been lacking." (p. 543).

Contrasted with the lack of precedent for plaintiff's claim is the generous number of cases concerning actions by mail [illegible]s against postmasters on common law grounds of tort and actions by patrons against telegraph companies

for misdeliveries, but not on the bonds of employees. Section 816 of the Postal Laws and Regulations (discussed more fully on pages 37-41, supra) provides an administrative remedy for mail users who have suffered loss by reason of the misdelivery of mail. That remedy has been available and used for about a half century. The absence of any cases involving actions on postmaster's bonds of the type here asserted, and the abundance of litigation against postmasters and telegraph companies on common law grounds, and the history of Section 816 of the Postal Laws and Regulations demonstrate that the claim of this plaintiff is contrary to the understanding of the courts and profession and the practice of the Post Office Department. Such a contrariety of position between this plaintiff and all others in the past suggests that it is this plaintiff which is not in a tenable position.

11. *Statement of Plaintiff's Claim Defeats It.* This action is for the full penalty of a postmaster's bond. It is for consequential damages for misdelivery of mail, and not for the intrinsic value of the matter lost. If the surety must pay the plaintiff, it will be subrogated against the postmaster for the amount of such payment. So the impact of plaintiff's claim will be borne by the postmaster. Since the claimed liability is in contract, it would attach even though the postmaster were without negligence and had acted in utmost good faith to comply with the numerous rules of his employer (See Pltf. Br., pp. 79-85). It must be plain, then, that plaintiff contends that Congress intended to impose upon its postmasters, without even troubling to say so in express terms, the tremendous liabilities which the principle of plaintiff's position entails. Any postmaster would

doubtless be surprised to learn that he had assumed this unexpressed and covert liability, and would think it unfair that neither Congress nor the Regulations had warned him of it in terms.

Plaintiff deposited in the mail certain letters to be delivered through defendant Malone's post office. The letters were of little or no value in themselves. Plaintiff itself did not consider them sufficiently valuable to warrant the expenditure of a few pennies of its own money for registration or insurance. When they arrived at defendant Malone's post office, there was nothing about the appearance of plaintiff's letters to disclose to the most prudent person that they contained or related to anything of value. Malone delivered those letters in a manner which he was "convinced" was "perfectly proper" (72). Subsequently, it turned out that the person to whom he had delivered them was engaged in perpetrating a criminally fraudulent scheme on the plaintiff. It further turned out that as a result of such third person's crimes and the use he made of Malone's subsequent and innocent misdeliveries, plaintiff's investment in a few three cent stamps had developed into a claim against the postmaster for over $34,000 (18). If plaintiff had dealt in bond issues instead of automobile paper, Malone's claimed liability would have been greately increased. If plaintiff had been one of the billion dollar institutions of the country, Malone's claimed liability would have been incalculable. And yet, so plaintiff claims, Congress intended to impose such staggering liability on country postmasters without troubling to plainly say so, but left the ascertainment of such intention to an implication to be spelled out in 165 pages of printed brief.

The omission of Congress to provide expressly for such far reaching contract liability beyond that independently existing demonstrates its intention that no such liability should be imposed. This is strikingly confirmed by the case cited on page 30 of plaintiff's brief, *United States v. Atlantic Coast Line R. Co.* (C. C. A. 4, 1914) 215 Fed. 56. That action was brought by the United States in its own interest and in the interest of the senders of certain pieces of mail matter against the Railway Company through whose negligence the mail matter in question was lost. The Railway Company carried the mail under a Government contract and had paid the Government five hundred dollars as a fine imposed by the Postmaster General "in full payment, accord and satisfaction therefor" (p. 58). Despite this, the Government sued to recover for the owner the value of certain diamonds in the mail so lost. The court denied recovery and said:

> "There is a very strong presumption that if the intention had been to impose upon railroad companies the very onerous obligation of being responsible, *this obligation of such vast consequence to both parties would have been clearly and directly expressed in the regulations.*"

So here, there is an equally strong presumption that if the intention of the Congress had been to impose upon postmatters or their bondsmen the onerous obligation of being responsible for the value of all contracts sent through the mails or that might be consummated by mailed acceptance of an offer, or for credits mistakenly extended in the course of the use of the mails, this obligation would have been clearly and directly expressed. Considering this very point, the court in the last cited case said:

"The absence of such expression creates a strong implication that it was not the intention to impose such liability. The implication against liability in such case is strongly indicated in German etc. Co. v. Home etc. Co., 226 U. S. 220; Atchison T. & S. F. Ry. v. United States, 225 U. S. 640. This view is further supported by the fact that *where the Government intends to impose such liability it is usually expressed in the written undertaking exacted from the party who undertook to carry the mail.* * * *"*

So here, if there had been an intention to impose upon the postmaster or his bondsmen liability to third persons for whatever they might send through the mail, or for whatever acts or omissions users of the mails might invite by their missives, surely Congress would have so stated in express terms.

Plaintiff's claim that Congress left to obscure implication an intention to impose such an extraordinary liability on its postal employees does violence to this Court's common experience concerning the care with which Congress has drafted the postal laws. If plaintiff is right, then Congress has expressly provided for notice to the surety in case the postmaster were short in his postage stamp accounts (39 U. S. C. A., Sec. 37), but has not provided for such notice in the event that a misdelivery entailed a hundred thousand dollar consequence. Congress has expressly provided that the passage of three years discharges the surety if there is an indebtedness to the United States, whose inspectors check the postmaster (Ibid., Sec. 40), but has failed to provide for the surety's discharge by any passage of time in the event of unverifiable claims based upon

the consequences of misdelivery of undisclosed mail. And so on.

12. *Bond Does Not Cover Mail User's Consequential Damage.*

There is no language of any statute, regulation, or bond condition which—in any manner or degree—indicates that Congress ever intended that mail users' consequential losses should be covered by postmaster's bonds. [Not only is there no such language respecting suits by mail users, but there is no such language providing for suit by the Government for consequential damages either, in its own behalf or on behalf of mail users. In the one particular case found in which it is contemplated the Government shall recover consequential damages in its own behalf, a special Regulation so provides (Postal Laws and Regulations. Sec. 1426, relating to money order blanks)]. It follows, then, that even if this plaintiff were intended to be an obligee of the bond, and even if this plaintiff were granted a right to sue in the name of the United States, still Congress never intended postmasters' bonds to cover claims of the type here asserted.

This loss, claimed, to be derived from the nature of the contents of sealed mail and from the subsequent crimes of another, was not to be anticipated by the handler of ordinary mail. It was far beyond the reasonable hazards of handling ordinary mail. Elementary rules of damages bar recovery for such losses. If Congress intended postmaster's bonds to cover losses not collectible in the absence of statute, surely Congress would have plainly said so. It is for plaintiff to establish his claimed right. Plaintiff points to no language in any statute, Postal Regulation or bond condition which,

expressly or by implication, discloses an intention that postmaster's bonds should cover such losses. There is no such language.

That the common law liability of the carriers of missives does not extend to damages not apparent from the face of the missives themselves is illustrated by *Kerr S. S. Co. v. Radio Corporation of America*, (1927) 245 N. Y. 284, 157 N. E. 140. In that case the plaintiff delivered to defendant a code message for transmission to a ship captain. Deciphered, the message instructed the captain to pick up a certain cargo. Defendant lost the message. As a consequence, the captain did not pick up the cargo. Plaintiff sued for the freight lost, but recovered only the price paid for the cablegram. Consider the case at bar. This plaintiff mailed letters which, being in plain envelopes, were as code to any postmaster handling them. Defendant Malone did not deliver them to the addressees. As a consequence, plaintiff failed to discover for a time that contracts which it previously had purchased and paid for were forged. Now plaintiff seeks to recover from that innocent postmaster, to whom the nature of the letters was unknown and could not lawfully be known, the money so paid by it to a third person prior to the mailing of the letters.

The loss here claimed is more remote than the loss claimed in the *Kerr* case. Here, plaintiff had paid its money prior to the mailing of the letters. As a consequence of the misdelivery of the letters, plaintiff lost only some time in pursuing the money previously paid out to the perpetrator of a criminal fraud on it.

Writing for the New York Court of Appeals in the *Kerr* case, the late Mr. Justice Cardozo said:

"* * * where the terms of the message give no hint of the nature of the transaction the liability is for nominal damages or for the cost of carriage if the tolls have been prepaid." (157 N. E. 141)

The hazard of loss such as here claimed was not apparent and could not be apparent to the postmaster. It is fair to assume that it was not apparent to the plaintiff. Otherwise plaintiff would have insured or registered the mail in question or, more likely, would have made some personal investigation of the makers of the forged contracts for which it spent over $30,000.00. The ordinary relationship between a postmaster, performing his duties to the Government, and a mail patron buying and using a three-cent stamp involves no such risk. No statute, bond or regulation says so. If it does involve such a risk, then postmasters are liable on their bonds for misplaced credit, lost contracts, defaulted lawsuits, lost marriages and neglected social obligations.

III. Application of the Law to the Foregoing Factors Negativing Congressional Intent Claimed by Plaintiff.

1. *Washington v. Young*, (1825) 10 Wheat. 455. Since plaintiff's claim rests upon a supposed implied intention of Congress, the proper disposition of that claim will depend in the last analysis upon the particular facts of this case. There is no purpose, then, to be served by burdening this Court with a multitude of citations having reference to different fact situations. However, a few cases have presented fact situations so analagous that particular study of those cases will be helpful.

Probably the most important early case in this Court which raised the question of the rights of a private person under an official's bond running to a governmental body as sole obligee is *Washington v. Young* (1825) 10 Wheat. 455. There the City of Washington, conducting a lottery, employed a manager who gave a bond to the city. The purchasers of a winning ticket brought suit on the bond in the name of the City but for the purchasers' personal benefit and without the consent of the City. It was held that private persons could not sue on the bond without the consent of the City. Marshall, C. J., said for this Court:

> "The first inquiry is into the right of the proprietors of the ticket No. 1037, to sue in the name of the corporation without its consent. Their counsel insists, that the bond was taken for the benefit of the fortunate adventurers in the lottery, and that each has a right to use it. * * *
>
> "* * * They had, undoubtedly, 'a right to apply to the corporation to direct the suit, and the corporation could not, consistently with their duty, have refused such application,' if the purpose of the bond was to secure the fortunate adventurers in the lottery, not to protect the corporation itself. But the propriety of bringing such suit was a subject on which the obligees had themselves a right to judge. If the proprietors of one prize ticket had an interest in this bond, the proprietors of every other prize ticket had the same interest; *and it could not be in the power of the first bold adventurer who should seize and sue upon it, to appropriate it to his own use*, and to force the obligees to appear in court as plaintiffs against their own will. *No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent*

> *given in fact, or by legal intendment.* * * * we think, upon general principles, they had no right to institute this suit without the consent of the corporation. (pp. 407-409)

The analogy between the *Young* case and the case at bar is particularly apt. Both actions are brought on governmental officer's bonds, in the name of the governmental obligee, for the benefit of a private person, without the consent of the named obligee. Both actions are brought on bonds which were taken by the government for its own protection and not for the protection of its patrons. On settled general principles, it was held that one who is not the owner of an obligation has no rights under it and that such a person cannot sue on it in the name of the owner without the owner's consent. The same argument was made there, as here, that the bond was taken for the benefit of the government's patrons. But this Court pointed out that even if such had been the case, still "it could not be in the power of the first bold adventurer who should seize and sue upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs against their own will" (p. 409). That is especially significant in this case where plaintiff's claim is based exclusively on the argument that postmasters' bonds are taken partly for the benefit of mail users. No one knows what other mail users may have been damnified.

This Court pointed out in the *Young* case that even if the bond had been taken exclusively for the benefit of the mail users, still no single one of them could race the others to the Court House and appropriate the entire security to himself to the exclusion of the others, and that such

person could not appropriate the name of the government without its consent. So, even if the bond here in suit had been taken *exclusively* for mail users, still this plaintiff could not sue on it in his own name and could not sue in the name of the government without its consent. Where, as here, plaintiff does not claim that the bond was taken exclusively for mail users, but only "secondarily" for them, it is of even greater importance that a private person be not able to appropriate the entire penalty to his own benefit and leave without security not only the other mail users but the Government for whose "primary" benefit the bond was taken. The actual holding in the *Young* case was that the bond was taken for the security of the city and not to secure its lottery patrons. What this court said in the *Howard* case (184 U. S. 676) was that the lottery bond was taken "primarily" for the benefit of the city (p. 691). So here, the acting postmaster's bond was taken for the security of the Government rather than for its postal patrons and plaintiff has no rights under the bond with or without the consent of the Government to the use of its name.

2. *Cases following Washington v. Young.* This Court has never deviated from the twin principles of the *Young* case, that no person other than the owner of a bond can put it in suit unless the legislature has granted such right, and that no person can use the name of another without its express or implied consent.

In *German Alliance Ins. Co. v. Home Water Supply Co.* (1912), 226 U. S. 220, the defendant had made a contract with the City to maintain pipes and waterworks and supply the City with water suitable for fire purposes. It failed

to do so, and the Insurance Company, insuring buildings destroyed by fire by reason of the failure, brought the action against the Water Company.. Demurrers to the complaint were sustained. Considering the contention of the Insurance Company that the contract between the defendants and the City was for plaintiff's benefit this court said:

"Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his *direct benefit*. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they '*may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names.*' Nat. Bk. v. Grand Lodge, 98 U. S. 123, 124. Hendrick v. Lindsay, 93 U. S. 143, 149; National Savings Bk. v. Ward, 100 U. S. 195, 202, 205. * * *

"The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.

"He is interested in the faithful performance of contracts of service by policemen, firemen, and *mail contractors*, as well as in holding to their warranties the vendors of fire engines. All of these employes, contractors, or vendors are paid out of taxes. But for the breaches of their contracts *the citizen cannot sue—though he suffer loss because the carrier delayed in hauling the mail*, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven, Negligence in Law

(3d ed.) 305; Pollock on Torts (8th ed.), 434, 547; Davis v. Clinton, 34 Iowa, 59, 61.

"Each of these promisors of the city, like the Water Company here, would be liable for any tort done by him to third persons. But for *acts of omission and breaches of contract*, he would be responsible to the municipality alone. *To hold to the contrary would* unduly extend contract liability, would introduce new parties with new rights, and would *subject those contracting with municipalities* to suits by a multitude of persons for damages which were not, and, in the nature of things, could not have been, in contemplation of the parties. * * *" (pp. 230, 231).

The reasoning of this Court in the *German Alliance* case, supra, and the language it used are directly applicable to the case at bar. This Court first distinguished a case in which the contract of the defendant with a governmental body, or the ordinance granting authority, expressly contemplated the benefit of suits by third persons. That is the distinction between the *Howard* case, supra, and the case at bar.

Further, this Court in the *German Alliance* case pointed out that even under the most liberal doctrine of any state permitting third parties to sue on contracts, an indirect interest, such as the sender of the mail has in the performance of a contract between the United States and a contractor to promptly transmit the mail, is insufficient to give such third party a direct action on the contract. In illustrating the point, by reference to a situation which this Court apparently considered too clear for argument (otherwise it would not have used the illustration), this Court pointed out that *the user of the mails cannot sue the mail contractor*

for delays in delivery, however much the sender may be damaged. That illustration is the case at bar.

This Court then pointed out in the *German Alliance* case, as we have here, that to hold that this suit might be brought would be to introduce new parties to the contract and extend liability thereunder to the limits of speculation and to multitudes of unknown, unidentifiable, and unforseeable persons. And lastly this Court pointed out the contrast between the consideration paid and the suggested liability assumed under the contract. So here, it is plaintiff's claim that, for three cents, it purchased not only the transportation of its letter but security against loss of invaluable contracts which its letter might produce.

The doctrine first announced by *Washington v. Young*, supra, and re-examined and reiterated in the *German Alliance* case, supra, has been consistently followed in later cases.

In *Robins Dry Dock and Repair Co. v. Flint, et al.* (1927), 275 U. S. 303, a steamship had been chartered to the libellant with a provision for docking same each six months and suspension of hire during the docking. The defendant was the docker under contract with the *owner of the vessel.* During the docking operation defendant negligently injured the vessel requiring repairs which extended the period of docking to the damage of libellant. The docker settled with the *owners of the boat,* but the libellant claimed the contract for docking between defendant and *the owners of the vessel* "was made for the benefit of the libellant and was incidental to the aforesaid charter party". (Just as here plaintiff claims that the postmaster's bond between the surety and the United States was for its benefit.) In reversing the Circuit Court

of Appeals, which had allowed recovery on other grounds, this Court, through Mr. Justice Holmes, said:

"Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner third persons, as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondent but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners —and while intentionally to bring about a breach of contract may give rise to a cause of action, Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See Savings Bank v. Ward, 100 U. S. 195. The law does not spread its protection so far. * * *" (p. 308)

"But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. *The respondents have no claim either in contract or in tort, and they cannot get a standing by suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents.*" (p. 309).

The italicized portion of the above quotation has direct application to this case.

It will be noted that Mr. Justice Holmes in the *Flint* case, supra, was careful to point out (arguing by analogy) that the mere fact that the United States might in some circumstances recover upon Malone's bond and be *morally bound* to give plaintiff some portion of the recovery, does not give plaintiff *itself* a right of action on the postmaster's bond. This very situation is anticipated and provided for by the Postal Laws and Regulations (Sec. 816), which provide that suits for misdelivery of mail shall be brought in a certain manner by the United States and that the recoveries in such suits shall be distributed by *administrative officers* to the persons found entitled thereto.

The views expressed by this Court in the *Flint* case, supra, and the *German Alliance*, supra, have been cited and followed in various federal and state courts. *Federal Surety Co. v. Minneapolis Steel & Machinery Co.* (C. C. A. 8—1927), 17 F. (2d) 242; *Chicago, etc. Ry. Co. v. Maryland Casualty Co.* (C. C. A. 8—1935), 75 F. (2d) 596, 598; *District of Columbia, to Use of Langellotti v. Fidelity Deposit Co. of Maryland* (Ct. App. D. C.—1921) 271 Fed 383; *Fosmire v. National Surety Co.* (Ct. App. N. Y.—1920), 127 N. E. 472; *Sunter v. Frazer* (Cal. 1924), 228 Pac. 660.

Moreover, the cases following *Washington v. Young* demonstrate that the statutes and bond here involved were not intended by Congress to confer on private persons a right to appropriate the name of the United States for their private lawsuits on the bond. A clear-cut analysis of this point and the cases underlying it was made by Judge Nordbye in his order of dismissal (74-77, 81-87). It is of marked signifi-

cance that another Court confronted with the identical question independently arrived at the same conclusion on the same authorities. *United States v. United States Lines Co.*, (D. C. N. Y.—1938) 24 Fed. Supp. 427. In the last cited case, registered mail was stolen while being transported by the defendant steamship lines under a mail contract with the United States. The mail contract provided that the steamship line would be liable to the United States for any loss or damage to the mails caused by the line's failure to use due care in handling mail. Certain insurers of the stolen mail, having paid the losses sustained, requested and received from the Attorney General express authority to bring suit in the name of the United States against the Lines to recoup their losses. However, before any suit had been commenced under the authorization from the Attorney General, the authorization was rescinded and revoked. Despite the revocation of the Attorney General's authorization, suit was commenced in the name of the United States on behalf of the insurers involved. The defendant moved for a dismissal on the grounds that the suit was brought without the consent of the United States and contrary to its instructions and that the plaintiffs had no authority whatsoever to act in the premises. (Page 427). Considering the questions thus raised by the motion the Court said:

> "It is clear that there is no privity of contract between United States Lines and the users of the mail or their subrogees. * * * The indirect benefit to the senders of the mail, if the United States should choose to sue, does not justify suit under the mail contract, *by the senders in their own right without the consent of the United States.* (Citing *German-Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 33 S. Ct. 32,

57 L. Ed. 195; 42 L. R. A. (N. S.) 1000 and quoting therefrom) * * *

The absence of privity of contract and of any right of the senders of the mail or their subrogees, to sue on a contract to which they were not parties seems to be recognized by the proctors for the libelant, for they have commenced this suit, not in the name of the individuals or corporations who are ultimately to benefit, but rather in the name of the United States of America *which alone stands in privity of contract with United States Lines.* * * *

It thus appears that although the United States Government, *the only party who may sue upon the cause of action pleaded* in the libel, has decided not to sue, an attempt is here made to bring suit *in its name and against its will.* * * * In my opinion, such an attempt cannot succeed, for were the law otherwise a person indirectly to be benefited by the enforcement of another's right, could bring suit in the latter's name, though in his own name he was without right of remedy, and the holding of German-Alliance Ins. Co. v. Home Water Supply Co., supra, could be thus easily avoided. * * *".

Referring to the cases relied upon by the proctors for the libelant in the cited case and by the plaintiff herein as justifying the maintenance of the action (*Howard v. United States*, 184 U. S. 676; *United States ex rel. Brimberg Bros. v. Globe Indemnity Co.*, (C. C. A. 2) 26 Fed. (2d) 191; *United States, ex rel. Matthews v. Massachusetts Bonding & Ins. Co.*, 202 N. Y. Supp. 867; Id., 238 N. Y. 334, 144 N. E. 631), the Court said:

"In each one of these cases suit was commenced in the name of the United States, and in the Howard Case it was stated that the consent of the United States to the use of its name was not necessary. However, each

> of these suits was upon a bond which had been posted to secure faithful performance of his duties by a certain individual occupying a public or quasi public position. The bonds were required by statute and were intended for the benefit of members of the public who would have dealings with the one who was bonded. Those cases, involving suits on bonds, are not persuasive here. Though the bonds ran to the United States of America, yet, by necessary implication, "by legal intendment" (Howard v. United States, 184 U. S. at page 691), suit was proper in the name of the United States, on the relation of the person suffering an injury which it was the purpose of the bond to safeguard. See the discussion in the Howard Case, 184 U. S. at pages 692, 693, relating to the nature of a bond and the express or implied right to sue given to the persons who are protected by the bond". (p. 429).

In closing, the opinion states: "I, therefore, reach the conclusion that the proctors for *libelant had no right to bring this action in the name of the United States without its consent*" (p. 429). A similar conclusion is compelled in the case at bar.

In *Idaho Gold Reduction Co. v. Croghan*, (Idaho—1899), 56 Pac. 164 the Supreme Court of Idaho, in sustaining a demurrer to plaintiff's complaint, stated:

> "We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute". (p. 164.)

The same conclusion was arrived at in *United States v. Griswold* (Ariz.—1904) 76 Pac. 596, a suit on a postmaster's bond, the Court stating it thus:

"At common law suit upon an official bond must be brought and a recovery had in the name of the obligee. There is no congressional statute modifying the common law limiting the liability of sureties to suits brought by or in the name of the United States, as there is in the case of bonds given by United States marshals. In the latter case there is statutory authority authorizing any person to bring, in his own name and for his sole use, suit on the marshal's bond for a breach of its conditions. Section 784, Rev. St. U. S. (U. S. Comp. St. 1901, p. 607 (28 U. S. C. A., Sec. 500). *It follows, therefore, that P. Sandoval & Co. could not maintain a suit on the postmaster's bond in their own name to recover for the loss of the registered package.* * * *".

More recent cases affirming these principles in suits on official bonds are: *Moody, Governor of Texas, ex rel. United States v. Megee,* (C. C. A. 5—1930) 41 Fed. (2d) 515, affirming (S. D. Texas—1929) 31 Fed. (2d) 117, [Pilot's bond naming Moody, Governor of Texas, as obligee; pilot negligently injured vessel owned by United States, which brought suit on his bond using name of obligee; demurrer to complaint sustained; Court holding bond did not run in favor of third persons]; *Bowers, Collector of Internal Revenue v. American Surety Co.,* (C. C. A. 2—1929) Fed. (2d) 244, [Bond given to secure payment of taxes; plaintiff's predecessor in office named as obligee; plaintiff's right to sue on bond in own name questioned; held, (headnote) in absence of some enabling statute, the obligee named in a bond must sue on it]; *Munroe v. Raphael* (1933) 288 U. S. 485, [Receiver, appointed by United States District Court, sold property to purchaser who agreed to pay therefor certain percentage of all allowed claims and gave bond running to

the United States for performance of purchase agreement; plaintiff, on permission of the Court, sued surety on the bond in the State court in the name of the United States on his own relation; District Court revoked its permission to so sue; Circuit Court of Appeals reversed action of District Court in so doing; Supreme Court reversed Circuit Court of Appeals, and re-established action of District Court, saying:

> "In parting with the property the receiver as the court's representative, took a bond, running not to the creditors, but to the United States. *Certainly no creditors could bring a suit in his own name on the bond for his share of the purchase money.*"]

If there be virtue in analogy or precedent, *Munroe v. Raphael*, supra, disposes of plaintiff's case.

In *Howard v. United States*, (1902) 184 U. S. 676, this Court again recognized the same principles, but found that the particular statute and "peculiar situation" of that case removed it from the operation of those principles. This Court again recognized that no person other than the obligee of a bond can have any rights under it unless such right be given by the legislature. The contention was made that since the bond was given to the United States, no suit could be maintained on it for the benefit of an individual. That was answered by the finding "that the Congress never intended that any such condition of things should exist" with reference to the particular type of bond and statute there involved. In the *Howard* case this Court also again recognized the second rule of the *Young* case,—that no person can be authorized to use the name of another, without his assent given in fact or by legal intendment. The court

which had custody of the bond for the Government had expressly authorized the plaintiff to sue on it (page 679). Consequently, it is doubtful whether any question of the Government's consent to the use of its name by the plaintiff was in the case. In any event, this Court followed the rule of the *Young* case that such consent could also be given by legal intendment and, examining the statutes and circumstances involved, concluded that such consent had also been given by the legal intendment of the particular statutes involved.

In reading the various cases cited in the briefs, it should be borne in mind that bonds running to the United States are to be construed by the common law of the District of Columbia, being regarded as made in the City of Washington. *Cox v. United States,* (1832) 6 Peters 172; *Tullock v. Mulvane* (1902) 184 U. S. 497, 514. The *Young Case,* supra, is the common law of the District of Columbia respecting this bond. *District of Columbia, to Use of Langellotti v. Fidelity & Deposit Co.,* (Ct. of App., Dist. of Col., 1921), 271 Fed. 383. Under that law plaintiff is without right to maintain this action.

IV. Factors Claimed by Plaintiff to Establish an Implied Congressional Intention: (1) That the Obligations on a Postmaster's Bond are Owed to Patrons of the Postal Service; and (b) That such Patrons Should Have a Right to Appropriate the Name of the United States to Maintain their Private Lawsuits on such Bonds.

1. *Plaintiff claims that mail users are benefited by Postmaster's proper performance of his contract with the Government, and therefore have a "substantive right."*

To be sure, mail users are benefited if the postmaster performs his contract. But that benefit is not the direct one which the *German Alliance*, supra, pp. 54-57, and *Flint*, supra, pp. 57-59, cases require as the basis of a substantive right.

Plaintiff's argument confuses indirect, incidental benefits with a "substantive right" (Pltf. Br., pp. 18-128, particularly pp. 18-22). Then, plaintiff's argument continues, the remedy for that "substantive right" is in the plaintiff in the absence of a statute restricting the remedy (Pltf. Br., pp. 128-165). Plaintiff's repetitious references to the statutes and regulations concerning the handling of mail (see, for example, Pltf. Br., pp. 3, 7-10, 14-17, 18-22, 33, 34, 35-36) are calculated to create the impression that the purpose of those laws and regulations is to directly and personally benefit and protect each individual postal patron. It might as well be argued that a railroad company's operating rules are promulgated for the direct, personal benefit and protection of each individual passenger and shipper. The improved service and increased safety resulting from observance of those operating regulations doubtless result in

a benefit and protection to passengers and shippers, and postal laws and regulations do the same for postal patrons. But the rules themselves are formulated for the company's or government's (i. e., the proprietor's) purpose of efficiently operating its business. From its repeated—but ill-founded—claim that such internal operating rules are established for plaintiff's personal benefit, plaintiff argues that the postmaster's bond requirements are likewise for plaintiff's personal, individual, direct benefit and somehow create a "substantive right" in the plaintiff. Such bonds will not support a direct action by this plaintiff any more than any other fidelity bond of an employee in a private or public utility business will support a suit by a customer. Plaintiff's argument really demonstrates the Congressional intent that the *direct* benefit from, and the *right to sue* on, postmasters' bonds should accrue to the Government rather than to its postal patrons.

A similar confusion is apparent in plaintiff's argument that "the letter of the bond statute confers benefits upon users of the mails as well as upon the Government" (Pltfs. Br., pp. 28-43). That claim rests solely on the proposition that the condition of the bond is the performance of "all duties," etc. Plaintiff then argues that that expression includes duties imposed "for the benefit of mail users" and assumes that duties imposed by the Postal Laws and Regulations incidentally benefiting mail users are "*for* the benefit of mail users" and are duties owed to such patrons.

The fact of the matter is that every one of plaintiff's cited cases which involved a duty imposed by the Postal Laws or Regulations is either a criminal prosecution or a civil action brought by the Government. Each of them was a suit by the United States. So plaintiff's cases them-

selves demonstrate that the duties imposed upon postmasters by the Postal Laws and Regulations (whether or not they incidentally benefit mail users) are duties *owed to the Government.* They do not establish that those duties are owed to private postal patrons like the plaintiff. *Grady v. United States,* (C. C. A.—8) 98 Fed. 238, (Pltfs. Br., p. 30); *United States v. Atlantic Coast Line R. Co.,* (C. C. A.—4) 215 Fed. 56, 59 (Pltfs. Br., p. 30); *National Surety Co. v. United States,* (C. C. A.—8) 129 Fed. 70, (Pltfs. Br., p. 31); *United States v. Bryan,* 82 Fed. 290 (affirmed 90 Fed. 473 (C. C., N. D. Cal.)), (Pltfs. Br., pp. 31, 43); *United States v. Rogde,* (D. C., S. D.) 214 Fed. 283, (Pltfs. Br., p. 32); *United States v. Sander,* (C. C., N. D. Ohio) 6 McLean 598, Fed. Cas. No. 16,219, (Pltfs. Br., p. 35); *United States v. Claypool,* (D. C., W. D. Mo.) 14 Fed. 127, (Pltfs. Br., p. 35); *Spinney v. United States,* 32 Ct. Cl. 397 (Pltfs. Br., p. 36); *Deal v. United States,* (C. C. A.—9) 11 Fed. (2d) 3, (Pltfs. Br., p. 39); *United States v. Barker,* (C. C. A.—3) 100 Fed. 34, (Pltfs. Br., p. 40); *United States v. Fordyce,* (D. C., W. D. Ky.) 122 Fed. 962, (Pltfs. Br., p. 42).

They are actions *by the Government,* demonstrating that those duties are owed not to patrons like the plaintiff, but to the Government. To maintain this action, it is not enough for plaintiff to show that it would have been incidentally benefited by the postmaster's performance of a duty imposed by the postal laws and regulations. Plaintiff must, but does not, go further and show that such duty was owing to it as well as to the Government. The surety contract being collateral to Malone's employment contract with the Government, and being intended to secure the performance of Malone's duties under the prin-

cipal contract, the obligations of the bond are owing to the party to whom the duties under the employment contract are owing—the Government. It follows, then, that plaintiff's enumeration of indirect benefits to mail users which would result from a postal employee's performance of his duties to the Government is not sufficient to establish that Congress impliedly intended to confer on private persons any original rights under postal bonds.

2. *Howard v. United States,* (1902) 184 U. S. 676:

It is manifest that plaintiff, generally speaking, relies for its entire right to maintain the action on *Howard v. United States,* (1902), 184 U. S. 676. That case follows and applies the principles of *Washington v. Young,* supra, but establishes a limited exception to those principles, dependent upon particular statutes and a "peculiar situation" not here involved.

In the *Howard Case,* supra, this Court, in reaching its decision (page 691) quotes the following extract from *Washington v. Young,* supra; and, to emphasize its point, in quoting it italicizes a portion of the quotation:

> "and no person can be authorized to use the name of another without his assent given in fact, *or by legal intendment.*"

There, as must be done in this case, this Court sought the legislative intention as to whether a private party should be able to sue on the bond. The particular condition of the clerk's bond there involved was "faithfully to discharge the duties of his office." The remaining conditions of that

bond were "seasonably to record the decrees, judgments and determinations of the court * * *". The latter condition obviously looks to private litigants and thus makes reasonable the argument that Congress intended that enforcement of all the conditions should be available to them. But consider the case at bar. The particular condition of the bond here involved is "faithfully discharge all duties and trusts imposed upon him as acting postmaster * * *". The remaining conditions are to "perform all duties as fiscal agent of the Government, * * * and * * * in connection with the Postal Savings System" (19). The latter conditions plainly look to the protection of the Government's money and property and indicates an intention that the enforcement of all the conditions should be by the employer of the bonded employee rather than by the employer's patrons.

Again in the *Howard* case this Court carefully points out that the United States, to whom the bond ran, had little interest, if any, to be protected by the bond thereon (bottom of page 687). Upon that premise, and that premise only, this Court (page 691) distinguishes *Washington v. Young*, supra, by pointing out that in that case "the bond was taken, primarily at least, for its (corporation of Washington) protection, and not for the benefit of ticket holders." In this case, the interest of the Government in its own money and property avoids that distinction from the *Young* case. The patent interest of the Government in protecting its own money and property in the hands of its postmasters clearly indicates that the bond here in suit was taken for its protection and not for the direct benefit of its postal patrons.

At the beginning of the opinion (pages 682-686) this Court in the *Howard* case reviews for several pages federal statutes applicable to federal clerks of court, and in the middle of page 692 of the opinion, after reviewing these statutes, places its decision squarely on the *intendment* of Congress that it found expressed in those statutes. The court buttressed this construction by pointing out (page 682) that the *money* in question had been paid the clerk in the *Howard* case pursuant to an order of the court, and the payor had no possibility of protecting himself from loss other than by an action on the bond. But the statutes and regulations applicable to the bond here in suit, by comparison, exclusively refer to Governmental action in connection with such bonds and disclose an intendment that the Government should enforce them. Here, plaintiff's mail was not deposited pursuant to any court or Governmental order and plaintiff ignored the insurance and registry provisions that had been made for his protection.

Plaintiff itself suggests that the postal service is a proprietary rather than a governmental function, and that "'the post office is in reality a public utility.'" (Pltfs. Br., p. 108). Therefore, in requiring postmaster's bonds, Congress was managing a business and presumably intended to take such bonds for the protection of the business and reserve to the business the rights of action thereon—the same way that prudent managers of similar businesses do. That is the *normal* situation and distinguishes this case from the "*peculiar* situation" which confronted this Court in the *Howard* Case. It discloses a different "legal intendment" as to whom postmaster's bonds should protect and who should have the right of action on them.

The conclusion of the opinion in the *Howard* Case (page 694) distinguishes that case from all other cases raised under other statutes relating to bonds on other officers, by pointing out and emphasizing the *"peculiar situation"* of the clerk of court toward private litigants in his court and by reason thereof their beneficial interest in his bond. This shows that the purpose of this Court was that the *Howard* case be regarded *sui generis,* and only a precedent as respects bonds of clerks of federal district courts under the then statute.

This conclusion that the *Howard* case is not a precedent in this case, or in every case involving an official bond, is fortified by a reading of the opinions in the *Howard* case in the lower courts. In the opinion of the Circuit Court of Appeals reported in 102 Fed. 77, the particular federal statutes applicable to clerks of court are reviewed. On page 81 of that opinion that court points out that little or no money of the United States, the obligee named in the clerks' bonds, comes into the hands of the clerk in the ordinary course of his duties, but the money of private suitors would be frequently in his hands. From this the Court drew the conclusion that the intendment of the statutes reviewed by it was that private suitors might sue upon the bond having placed their money with the clerk as "a private trust".

The distinction between the *Howard* case and this case is obvious. The obvious and preponderant interest of the Government in protecting its own property in the hands of the postmaster, reject any interpretation spelling out any intendment of the statutes or the regulations that the Postmaster's bond is for the benefit of private mail users. Particularly is this true in the light of the remedies and

procedure set up by Sec. 816 of the Postal Laws and Regulations.

The distinction above made between the *Howard* case and this case is further buttressed by the opinion of the trial court in the *Howard* case (93 Fed. 719), where the judge who ordered the money in question delivered to the clerk pointed out (pages 720-721) that the clerk in question received little or no money of the United States, since suits in which the United States was interested were within the jurisdiction of another court, i. e., the district court at that time.

Aside from these legal distinctions, there is a practical distinction between the *Howard* case and this case. In the *Howard* case the clerk who received the money from Henry County paid in satisfaction of Stewart's claim (184 U. S. 682) could not help but know what he received and what the results from his mishandling or loss of the money would be. Yet with this knowledge he deposited the money to his *individual credit* rather than that of his office. Compare that situation with that of a postmaster who, without any knowledge of the contents or purpose of letters received in his postoffice, whether addressed to a person known or unknown to him, either misdelivers or fails to deliver that letter, being "convinced" that his procedure is perfectly "proper" (72). Under no stretch of the imagination can it be claimed that he is in the same position as a man who receives delivery of property the nature and character of which is apparent at delivery and in no way concealed or withheld from his scrutiny, and appropriates such property to his personal use. There is no element of thievery in the postmaster's conduct, and there is no index of value in the property involved. To hold a postmaster to

the same measure of liability as the clerk in the *Howard* case is to extend the "peculiar situation" spelled out by this court in the *Howard* case far beyond the limits indicated by the views expressed in the various decisions.

The *Howard* case aside, plaintiff is without authority for any of the contentions urged by it in support of its right to sue on the bond, either in the name of the United States or otherwise. The fact that this court in the *Howard* case by an analysis of the federal statutes pertaining to clerks of United States circuit courts and having in mind that the United States was hardly ever a litigant in those courts, found the intendment required by the rule of *Washington v. Young*, supra, and applied that intendment to the bond before it so as to permit recovery by Stewart, is not a departure from the rule of *Washington v. Young*, supra, but is at best a very limited instance of statutory authority for a third person to sue on the particular bond there involved *with the consent of the United States.*

3. *Remaining cases cited and quoted by plaintiff.*

It will serve no useful purpose to refer to each of the 166 cases cited in plaintiff's brief. Plaintiff cited only 42 cases to the Circuit Court of Appeals, and examination has disclosed that plaintiff has now cited 124 additional cases. They add nothing. However, plaintiff seems especially to rely on the cases wherein the United States was permitted to recover on a postmaster's bond for losses to postal patrons even though the Government sustained no loss of its own (Pltfs. Br., pp. 119-127). Two distinctions between those cases and the case at bar are immediately apparent: (a) Each of those cases was a suit by the United States,

the named statutory obligee, and not like this one a suit by a stranger to the bond. To that extent they support defendant's position rather than plaintiffs. (b) No one of those cases was a suit for consequential damages, but each was a suit for the value of goods lost in the mail. This second distinction lies in the considerations upon which those cases rest. The recovery by the Government in those cases was supported on the ground of the Government's "moral obligation" to recover from a wrongdoer and turn over the amount of the recovery to its customers. For example see *United States v. American Surety Co.* (C. C., Md.) 161 Fed. 149 (cited and quoted on page 124 of Pltfs.' Br.). The description of the Government's obligation to its customer as a "moral obligation" is one way of saying that there is no *legal duty.* None of the cases pointed out any moral or legal obligation *to the patron* imposed upon the surety by its bond. Nevertheless, plaintiff argues that because the Government can recover as bailee, and since—under the law of bailments—a right of recovery by the bailee does not preclude a right of recovery by the bailor (8 *C. J. S.* 371), the mail user-bailor should be permitted a recovery in this action. Plaintiff fails to point out that, in the law of bailments, a bailee may recover from a wrongdoer the full value of the bailed goods even though the bailee is under no liability to the bailor unless and until the bailee so recovers. 6 *Am. Jr.*, pp. 386-387 (Bailments, Sec. 302). Plaintiff also fails to point out that a bailee is under no *obligation* to sue for its bailor. See, 6 *Am. Jr.* 377 (Bailments, Sec. 292). Therefore, if the Government's right to recover for the benefit of its postal patrons is based upon a "duty" of any kind—moral or legal—then such right is not based upon the law of bailments because

no such duty is imposed on a bailee. A bailee owes no duty to the bailor to sue the third person, and a bailee may sue the third person even though not itself liable to the bailor for the loss of the goods. See, *Am. Jr.*, supra.

If the law of bailments has any application to this action at all, it is only to demonstrate that the action cannot be maintained for the consequential damage plaintiff has alleged. A bailee cannot recover consequential damages for the loss of the goods. A bailee's right to recover the full value *of the bailed goods* is based upon his right of possession. A wrongdoer who does not claim under the bailor cannot assert the bailor's title. So, the bailee's right of possession is good title as against the wrongdoer who has no better title and cannot assert the rights of the only person who does have a better title. *The Winkfield* (1902) Probate (Eng.) 42, 3 B. R. C. 368-C. A.; 6 *Am. Jur.*, pp. 387-388. (Bailments, Sec. 303). So, the bailee is allowed to recover the full value of the property taken from him on the ground that as against the wrongdoer the bailee is the owner. But the ground of such recovery (the bailee's possession and title as against the wrongdoer) precludes the bailee from recovering the value of something he never had and never could have—that is to say, the consequential damage. But that is what this plaintiff says the Government as bailee could recover for it as bailor. And that is what has never happened in any of the cases plaintiff cites to support that claim. Plaintiff seeks to recover the losses from transactions which it says it would not have undertaken had there been proper delivery of "bailed" letters The bailee (post office), once having delivered plaintiff's letter, would lose its possession and qualified title to the letter, and never would have possession or title under any

circumstances to that value which would or could result only to the plaintiff from its delivery of the letter.

Another description of the moral obligation on which the Government so recovers is its position as *parens patriae*. *United States v. United States Fidelity & Guaranty Co.* (C. C. A. 6, 1918) 247 Fed. 16, 18 (quoted Pet. Br., pp. 125-126). In any event, none of the cases cited by plaintiff supports its claim that a private mail user may directly recover on the Government's bond for consequential damages to the patron. The fact that the Government makes the recovery establishes that it, and not the mail users, is the sole obligee of the bond and the sole party possessing any right to sue thereon.

These distinctions (a) that the Government is plaintiff; and (b) that the suits are for only the intrinsic value of the goods lost and not for the consequential damages, are buttressed by the statement of Mr. Justice Holmes in *Robins Dry Dock and Repair Co. v. Flint, et al.*, (1927) 275 U. S. 303:

> "But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. *The respondents have no claim either in contract or in tort, and they cannot get a standing by suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents.*" (p. 309).

The italicized portion of the above quotation has direct application to this case.

CONCLUSION.

If this plaintiff can sue this bond without the consent of the United States, others like it can do so. If they can sue it without consent of the United States, they can sue without knowledge of the United States. The Government will then not know which postmasters are bonded for the care of Government money and property and which bonds have been exhausted by mail-users. Then the elaborate provisions of statutes and regulations defining the liability of the bond respecting Government money and property are stripped of significance save as models of literary form. That was not their intent or purpose.

The Acts of Congress require that the obligee of this bond be the United States and that suit be in its name. That evinces intent that the United States be plaintiff. That purpose is not served by ignoring those statutes as this action does. The Regulations, with concomitant statutes filling the interstices, form a consistent whole for the protection of Government in respect of each class of property that may come to, and each act that may be done by, a postmaster. The fact that occasional statutes fill the interstices of the Regulations, coupled with the long history of the Regulations, show a Congressional cognizance and approval of the scheme as a whole. The extent of responsibility of the bond is defined for the various types of property and acts, and when the bond is to be held for consequential damages beyond the intrinsic value of property express provision is made (Postal Laws & Regulations, Sec. 1426). Not only is a consistent scheme thus provided for the protection of Government, but a similar one has been

worked out to afford administrative remedy through the Government in proper cases to the users of the mail. Losses to patrons through negligence of the postmaster or through any other imaginable act are explicitly provided for, and suit is afforded on the bond by the proper officers of the United States in accordance with the purposes of the statutes and the interrelationships of the scheme. Distribution to mail users of the proceeds of such suit on the bond by the United States is provided for. In this way suits are brought by the United States the obligee, the patrons' interests are cared for, the bond is not exhausted to the prejudice of the United States and of other patrons by the first bold adventurer that may seize upon it, and bondsmen are held to a single standard of liability.

All this must be ignored if plaintiff is to maintain this suit. Not only that, but plaintiff must also establish that the Congress and the Department which gave it so many safeguards were inadvertent in failing expressly to give it an action. If that be assumed, plaintiff must further establish that the statute which requires suit in the name of the United States is complied with by the United States' refusal to sue, and establish that a legislative intendment permitting others than the obligee to sue on such bonds is the necessary implication of the absence of legislation. If all these be assumed, plaintiff must further establish that the bond is liable for what the obligee United States has never in any case claimed,—not for what the postmaster lost but for what some one else did before the postmaster made an innocent mistake. The money lender, who did not investigate the loan but who believed the forger and paid him over $30,000, claims that the postmaster's similar belief in the forger and resultant misdelivery of form letters

subjects him and his sureties to the same civil liabilities as the forger.

To do all this plaintiff relies upon a case arising under different statutes and peculiar circumstances where a court officer stole tangible money left with him by order of court. It is a case which this Court characterized as a "peculiar situation" in the light of the relationships involved. That case aside, plaintiff would have nothing to argue about here, and a great welter of words would be avoided. A "peculiar situation" does not furnish a precedent. The other cases decided by this Court and above referred to do not arise out of a "peculiar situation" and furnish precedents which compel affirmance of the judgments below.

Respectfully submitted,

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No. 236

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE

ON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AMICUS CURIAE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Statement of interest of the United States	5
Summary of argument	5
Argument	8
A patron of the mails may not sue on a postmaster's bond without the consent of the United States to recover losses consequent upon the misdelivery of the mails	8
Conclusion	23
Appendices:	
A	24
B	34
C	36
D	38
E	41

CITATIONS

Cases:	
American Surety Co. v. *Lawrenceville Cement Co.*, 96 Fed. 25	10
American Surety Co. v. *United States*, 133 Fed. 1019	22
Bates & Guild Co. v. *Payne*, 194 U. S. 106	18
Corp. of Wash. v. *Young*, 10 Wheat. 406	14, 23
Decatur v. *Paulding*, 14 Pet. 497	18
Dist. of Col., etc., v. *Fidelity & Deposit Co.*, 271 Fed. 383	15
Fosmire v. *National Surety Co.*, 229 N. Y. 44	13
Francis v. *West. Union Tel. Co.*, 58 Minn. 252	9
German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U. S. 220	15, 20
Gibson v. *United States*, 208 Fed. 524	22
Globe Ref. Co. v. *Landa Cotton Oil Co.*, 190 U. S. 540	9
Hadley v. *Bazendale*, 9 Exch. 341	9
Howard v. *United States*, 184 U. S. 676	7, 14, 21, 22, 23
Idaho Gold Reduction Co. v. *Croghan*, 6 Idaho 471	20
Illinois Surety Co. v. *Peiler*, 240 U. S. 214	11
Kellner v. *Western Union Tel. Co.*, 126 Minn. 122	9
Mass. Bond. & Ins. Co. v. *United States*, 54 F. (2d) 1039	22
Mellon v. *Michigan Trust Co.*, 271 U. S. 236	10
Moore v. *United States*, 166 U. S. 571	11

Cases—Continued. Page

Munroe v. *Raphael*, 288 U. S. 485 15
Nat'l Surety Co. v. *United States*, 129 Fed. 70 22
Primrose v. *Western Union Tel. Co.*, 154 U. S. 1 9
Public Clearing House v. *Coyne*, 194 U. S. 497 18
Smith v. *United States*, 14 C. Cls. 114 11
Soule v. *United States*, 100 U. S. 8 11
United States v. *American Surety Co.*, 155 Fed. 941 22
United States v. *American Surety Co.*, 163 Fed. 228 22
United States v. *Cash*, 293 Fed. 584 11
United States v. *Eddy*, 28 Fed. 226 11
United States v. *U. S. Fidelity & Guaranty Co.*, 25 F. (2d) 500 12
United States v. *U. S. Fidelity & Guaranty Co.*, 247 Fed. 16 22
United States v. *Geise*, 56 Fed. (2d) 583 12
United States v. *Heaton*, 128 Fed. 414 10
United States v. *Griswold*, 8 Ariz. 453 ..... 20, 22
United States v. *Norton*, 107 Fed. 412 11
United States v. *United States Lines*, 24 F. Supp. 427 ..... 15, 20
U. S. Fidelity & Guaranty Co. v. *United States*, 229 Fed. 397 22
U. S. Fidelity & Guaranty Co. v. *United States*, 246 Fed. 433 22
Wile v. *U. S. Fidelity & Guaranty Co.*, 6 Alaska 48 26
West. Union Tel. Co. v. *Hall*, 287 Fed. 297 9

Statutes:

Act of Apr. 10, 1806, 2 Stat. 373 (See 1 Op. Atty. Gen. 92 (1800) 15
Act of March 3, 1825, 4 Stat. 103 20
Act of June 8, 1872, c. 335, sec. 65, 17 Stat. 293, as amended by the Act of March 1, 1909, c. 232, 35 Stat. 670, and Act of June 15, 1921, c. 18, sec. 304, 42 Stat. 24 (U. S. C., Tit. 39, sec. 34; Postal Laws and Regulations, sec. 410) 2
Act of June 8, 1872, c. 335, sec. 13, 17 Stat. 287 (U. S. C., Tit. 5, sec. 337; Postal Laws and Regulations, sec. 62 (1) 2
Act of July 31, 1894, 28 Stat. 207, sec. 8 12
Act of June 28, 1932, 47 Stat. 338 (U. S. C., tit. 39, secs. 381, 381a, 384, 384a) 22
Revised Statutes, Sec. 919 (U. S. C., tit. 28, sec. 732; Postal Laws and Regulations, sec. 285 (2)) 3
U. S. C., Tit. 6, Sec. 5 12
U. S. C., Tit. 11, Sec. 78 (Supp.) 15
U. S. C., Tit. 22, secs. 78, 103 ..... 12, 15
U. S. C., Tit. 31, Sec. 73 11
U. S. C., Tit. 28, Sec. 500 15
U. S. C., Tit. 39, Sec. 132 17
U. S. C., Tit. 39, Sec. 40 ..... 11, 12
U. S. C., Tit. 40, Sec. 270 ..... 12, 15
U. S. C., Tit. 39, secs. 381, 381a, 384, 384a 22

Postal Laws and Regulations:

Sec. 10 (7) 16
Sec. 27 (1) 16
Sec. 69 (U. S. C., tit. 6, secs. 2, 3) 16, 24

Postal Laws and Regulations—Continued — Page
Sec. 70 — 16, 25
Sec. 71 — 16, 25
Sec. 72 — 16, 28
Sec. 252 (3) — 17
Sec. 269 (U. S. C., tit. 39, sec. 44) — 16, 28
Sec. 283 (2) (U. S. C., tit. 39, sec. 37) — 17
Sec. 291 (U. S. C., tit. 28, sec. 670) — 12
Sec. 298 (1) (U. S. C., tit. 39, sec. 40) — 11
Sec. 414 — 16, 29
Sec. 415 (U. S. C., tit. 39, sec. 38) — 16, 28
Sec. 416 (U. S. C., tit. 39, sec. 39) — 16, 29
Sec. 422 — 16
Sec. 472 — 16
Sec. 473 (6) (7) — 16
Sec. 777 — 19, 30
Sec. 813 (1), (2), (4) — 19
Sec. 816 — 18, 20, 32
Sec. 1382 (6) (f) — 10
Sec. 1389 (6) — 10

Miscellaneous:
Annual Report of the Postmaster General for fiscal year ended June 30, 1938, p. 170 — 16
Letter of Atty. Gen., of Sept. 22, 1936, to Leonard, Street, and Deinard — 36
Letter from the Chief Inspector of the Post Office Department to the Solicitor General — 38
Letter from the Acting Comptroller General to the Acting Solicitor General — 41

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BRIEF FOR THE UNITED STATES AMICUS CURIAE

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 102–107) is reported in 103 F. (2d) 450. The opinion of the United States District Court for the District of Minnesota (R. 70–87) is reported in 23 F. Supp. 411.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 24, 1939 (R. 107–108), and a rehearing was denied May 10, 1939 (R. 115). The petition for

certiorari was filed July 28, 1939, and was granted October 9, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a private patron of the mails may sue without the consent of the United States to recover consequential damages resulting from the misdelivery of mail.

STATUTES INVOLVED

Act of June 8, 1872, c. 335, sec. 65, 17 Stat. 293, as amended by the Act of March 1, 1909, c. 232, 35 Stat. 670, and Act of June 15, 1921, c. 18, sec. 304, 42 Stat. 24 (U. S. C. Tit. 39, sec. 34; Postal Laws and Regulations, Sec. 410) provides:

> Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department. On the death, resignation, or removal of a postmaster, his bond shall be delivered to the General Accounting Office, * * *

Act of June 8, 1872, c. 335, Sec. 13, 17 Stat. 287 (U. S. C. Tit. 5, Sec. 377; Postal Laws and Regulations, Sec. 62 (1)), provides:

> All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America.

Revised Statutes, Sec. 919 (U. S. C., Tit. 28, Sec. 732; Postal Laws and Regulations, Sec. 285 (2)), provides:

> All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes and all suits arising under the postal laws, shall be brought in the name of the United States.

Other pertinent provisions of the Postal Laws and Regulations are set forth in Appendix A, *infra*, p. 24.

STATEMENT

The petitioner sued to recover for its own use and benefit, from an acting postmaster and his surety, the penal sum of the postmaster's bond. The action was brought in the name, but without the consent (R. 58–60) (see Appendix C, p. 36), of the United States. According to the allegations in the complaint, the facts were as follows:

During the period involved in this case the petitioner was engaged in the business of automobile financing, in the City of Minneapolis, Minnesota (R. 3), and the respondent Malone was the acting postmaster at Montgomery, Minnesota. In the course of its business the petitioner purchased from automobile dealers in various localities negotiable paper secured by automobile sales contracts (R. 3–4). Thomas Hunting, a dealer in Montgomery, Minnesota, sold spurious sales contracts and promissory notes to the petitioner, giving fictitious credit references (R. 6, 8–10). In accordance with its usual practice, the petitioner sent out letters

of inquiry to the credit references, and mailed payment books, insurance certificates, and receipts to the supposed purchasers (R. 6–8).

The complaint alleged that Malone delivered all such mail to Hunting at the latter's request (R. 9–10, 16), thereby enabling Hunting to answer some of the credit inquiries himself, and to forge the documents sent to the supposed purchasers or arrange for the necessary replies (R. 9–10). The complaint alleged that the petitioner was damaged to the extent of $34,997.03, the net sum paid Hunting for the worthless notes and contracts (R. 17, 18). This action was instituted to recover on the respondent's bond as acting postmaster.[1]

The bond (R. 19) named the United States of America as obligee, and was conditioned as follows:

> That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System. * * *.

The respondents' demurrer (R. 25–27) to the complaint on the ground that the action could not be main-

[1] The opinion of the District Court states (R. 84) that the bond in suit was superseded by a new bond when Malone was elevated from acting postmaster to postmaster.

tained without the consent of the United States was overruled (R. 27–30). The objection was renewed by motions to dismiss made at the close of the testimony (R. 61–63, 64–65). Judgment was reserved on these motions (R. 63). After the jury's verdict for the petitioner (R. 63), the surety company's motion to dismiss was granted (R. 67, 70–87).[2] The judgment of dismissal was affirmed on appeal to the Circuit Court of Appeals for the Eighth Circuit (R. 107–108), and this Court granted certiorari.

STATEMENT OF INTEREST OF THE UNITED STATES

The bonding of postmasters provides security to the United States against losses of its funds and property through failure of postmasters to carry out their duties. Recovery in this case will exhaust the penalty of the bond. The same result may be anticipated generally if private actions may be maintained for such claims without the consent of the United States.

SUMMARY OF ARGUMENT

There is no basis in principle or authority for the maintenance of this action without the consent of the United States. The bond is made to the United States as required by statute. The authorities are agreed that in the case of a statutory bond only the obligee may sue unless consent for another to sue can be found in the statute requiring the bond. The act in question here

[2] After the dismissal of the surety company the District Court entered a supplemental order dismissing the action against respondent Malone for want of jurisdiction, both he and petitioner being citizens of Minnesota (R. 88).

admittedly contains no express consent and no implied consent can be discovered.

The statutes, the regulations, and the terms of the bond indicate that the dominant and, we believe, the sole, purpose of the bond is to furnish security to the United States against loss of those of its funds and property for which postmasters are responsible, and that such bonds are relied upon to protect the Government against losses through failure of postmasters to carry out their duties. It is evident that the predominant interest of the United States cannot be protected if private individuals, in suits on the bonds, brought without the consent of the United States, are permitted to recover indirect or consequential damages resulting from misdelivery or delay in the delivery of mail. In this case the petitioner's demand is for the full amount of the bond and will exhaust the security if recovery is allowed. Similar results are to be anticipated generally if such private actions may be maintained.

The United States could not protect itself against such exhaustion of its security by increasing the amount of these bonds to cover consequential private losses. The amount of consequential private damage likely to occur is wholly conjectural and cannot be anticipated even approximately. Therefore the penalty of the bond cannot be fixed in an amount assuredly sufficient to cover such losses in addition to those suffered by the United States.

Nor would the courts have authority to protect the security provided to the United States by postmasters'

bonds if private actions such as this were to be permitted without legislative safeguards. The recognition of priority for claims of the United States and the restriction of the period within which private actions may be commenced require statutory authority.

Procedural considerations likewise support the conclusion that private persons may not maintain such actions without the consent of the United States. An administrative procedure is available to private individuals for the recovery of losses incurred in using the mails, some provisions of which are inconsistent with the view that private suits were contemplated. The paucity of cases involving private actions on postmasters' bonds forcibly indicates that the existing administrative procedure has been generally effective to satisfy all reasonable demands. Moreover, in judicial proceedings commenced by the United States the determination by Postal officials as to whether the Postal regulations have been violated, made in the course of the investigation of private claims required by the regulations, would presumably be entitled to substantial weight. This aid to the correct determination of the rights of the complaining private parties would not usually be available if private individuals were to forego the administrative remedy and seek to enforce their claims directly by private suit.

Existing authority supports the position of the Government. *Howard* v. *United States*, 184 U. S. 676, a case involving a private suit on a court clerk's bond, is

not opposed. The evident purpose of the bond in that case was to protect private litigants as well as the Government. The interest of the Government was relatively small, and the circuit court which appointed the clerk consented to the action. In that case this Court expressly distinguished the situation where the bond is given "primarily" for the protection of the Government (*id.* 691). Moreover, enlargement of the penalty of the clerk's bond was found to be available there as an adequate protection of the interests of the United States (*id.* 690).

ARGUMENT

A PATRON OF THE MAILS MAY NOT SUE ON A POSTMASTER'S BOND WITHOUT THE CONSENT OF THE UNITED STATES TO RECOVER LOSSES CONSEQUENT UPON THE MISDELIVERY OF THE MAILS

The penal sum of the bond in suit is $16,000.00. The petitioner's demand is $16,000.00. Recovery, if allowed, would exhaust the bond and leave the United States without security for payment of any deficiencies which may be discovered in the postmaster's account.

The danger of exhaustion of the bond is not peculiar to this case. The amount of damages which may result from misdelivery or delay in the delivery of mail is unpredictable. If recovery of such damages by private claimants should be permitted it would frequently result in depletion or complete exhaustion of the security now available for the protection of the United States.

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[2] It may be doubted whether damages are properly recoverable for indirect losses of the kind claimed in this case even if the United States had consented to the suit. Every case in which

No means would be available for protecting the security afforded to the United States by postmaster's bonds if such suits were permitted. It is no answer that the penalty of the bond can be fixed in such amount as the Postmaster General deems necessary. It would

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the United States has sued on account of loss to private persons has involved loss of or damage to property in the mails and the claim has been limited to the ascertainable value of the merchandise, money, or other tangible property lost or damaged. Recovery for other losses would appear to be precluded by the settled principle that damages recoverable for breach of contract are limited to those within the contemplation of the parties when the contract was executed. *Hadley* v. *Baxendale*, 9 Exch. 341; *Globe Refining Co.* v. *Landa Cotton Oil Company*, 190 U. S. 540. The analogy of the telegram misdelivery cases is compelling. Since the decision in *Primrose* v. *Western Union Tel. Co.*, 154 U. S. 1, 29-34, it has been settled that, even in the absence of contractual or statutory limitation, a telegraph company is not liable for consequential loss flowing from a delayed, misdirected, or incorrectly transcribed telegram, unless it has been clearly put on notice by the context of the telegram that such damage would result from failure to fulfil the contract of transmittal. *Cf. Western Union Tel. Co.* v. *Hall*, 287 Fed. 297 (C. C. A. 4); *Francis* v. *Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078; *Kelliher* v. *Western Union Tel. Co.*, 126 Minn. 122, 147 N. W. 951. Sealed letters, unlike open telegrams, give no inkling of the damages consequent upon misdelivery, and in this case there is nothing in the record to indicate that the postal authorities were apprised of the likelihood of the type of damage suffered.

The record does not contain the evidence introduced at the trial, the trial court's charge, or the jury's verdict. The District Court's opinion states that "The testimony * * * did not directly establish that Malone [the postmaster] was knowingly a party to the fraud" (R. 72) and states also that Hunting "was able to convince Malone that it was perfectly proper for the 'Midland Mail' to be delivered to him" (R. 72); and the opinion of the Circuit Court of Appeals recites that "It is not claimed that * * * he [the postmaster] had any knowledge of the fraud * * *" (R. 103).

be impossible for the Postmaster General to ascertain the extent to which bond penalties should be enlarged to provide indemnity against losses such as those claimed here and still maintain sufficient protection to the United States. Past experience furnishes a guide to the annual incidence of loss with respect to both Government funds and private property damaged or lost in the mails. The amount of the bond penalty may be fixed accordingly. But experience has not provided, and cannot be expected to provide, any basis for estimating the extent of prospective indirect or consequential losses which may result from misdelivery or delay in delivery of the mails.[1] (See Appendix D, p. 38.)

Nor would the courts have authority to protect the Government's dominant interest in the postmaster's bond if private suits on such claims were allowed. In the absence of express legislation the Government would not be entitled to priority (*Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, 239; *United States* v. *Heaton*, 128 Fed. 414 (C. C. A. 3), but, at most, could obtain a pro rata share of the bond penalty (*American Surety Co.* v. *Lawrenceville Cement Co.*, 96 Fed. 25, 126 Fed. 811 (C. C. Maine) affirmed *sub nom. United States* v. *American Surety Co.*, 135 Fed. 78 (C. C. A. 1).

[1] The difficulty of insuring against such losses has received express recognition in the administration of the Post Office Department. With respect to registered or insured mail Sections 1382 (6) (f) and 1389 (6) of the Postal Laws and Regulations provide that no indemnity will be paid "for indirect, remote, and unnecessary expenses incident to repairs or duplication of papers *or for any consequential loss.*" [Italics supplied.]

These regulations would seem to have direct application to claims against the Government for indirect or consequential loss resulting from the mishandling of insured or registered mail.

Private patrons of the mails are in a position to prosecute their claims before the Government has completed settlement of the postmaster's accounts. If the race is to the swift the bond may be exhausted even before any indebtedness to the United States is discovered and whenever that occurs the Government would be denied all possibility of recovery. The substantial effect of ignoring the interest of the United States where, at the time the private suit is commenced no claim of the Government has been made, would be to re-write the statute of limitations applicable to Government suits on such bonds by making the Government's rights wholly subject to the capricious hazards of private litigation.[5]

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[5] There is no suggestion in the petitioner's brief that the United States is barred by statute from suing the surety on any deficiency subsequently discovered in the Postmaster's account. Section 298 (1) (U. S. C., Tit. 39, Sec. 10) of the Postal Laws and Regulations relieves the surety from liability "if on a settlement of the account of any postmaster it shall appear that he is indebted to the United States, and suit therefor shall not be instituted within three years after the close of such account." The three-year period begins to run only from the date of discovery of the indebtedness, whenever that may be. The word "settlement" means "an administrative determination of the amount due." *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 219. Such determination may be reopened at any time, at least on the discovery of fraud or mistake. *Soule* v. *United States*, 100 U. S. 8, 11; *Moses* v. *United States*, 166 U. S. 571, 594; *Smith* v. *United States*, 14 C. Cls. 114, 118; cf. *United States* v. *Norton*, 107 Fed. 412 (C. C. A. 5); *United States* v. *Eddy*, 28 Fed. 226 (C. C. N. D. Ohio). The word "close" is used interchangeably with the word "settlement" (cf. U. S. C., Tit. 31, Sec. 73) and may reasonably be given the same meaning in this statute. *United States* v. *Cash*, 293 Fed. 584 (C. C. A. 5). While the use of both terms in the same statute suggests that some difference in meaning may have been intended, the word "close" would seem to refer to the final settlement,

Experience has evidenced the necessity of legislative safeguards to protect the Government's interests where private suits are permitted. The Congress found it necessary, for example, to amend the statute permitting private suits on contractor's bonds so as to give priority to the claims of the United States and to forbid private actions until six months after final settlement and completion of the contract. See U. S. C., tit. 40, sec. 270, House Report 2360, 58th Cong., 2d Sess. The statute authorizing private suits on consular bonds expressly gives priority to the claims of the Government. U. S. C., Tit. 22, Sec. 103. In the absence of such

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after the postmaster has left the postal service and all items have been audited, the postmaster's account being treated as a "running account" for the term of his office. See Appendix E. Related statutes and regulations make it clear that the account of a postmaster may be reopened whenever a deficiency is discovered, even after he has left the postal service. Postal Laws and Regulations, Sec. 272 (3); *Id.* Sec. 291, U. S. C., Tit. 28, Sec. 670.

A statute relating generally to actions against sureties of bonded officials provides that the action must be instituted within five years of "a statement of the account" showing any indebtedness to the United States (U. S. C., Tit. 6, Sec. 5; see *United States* v. *United States Fidelity & Guaranty Co.*, 25 Fed. (2d) 500 (D. Md.); *United States* v. *Geise*, 56 Fed. (2d) 583 (C. C. A. 2)) but it is understood that this statute has no application to actions against a postmaster's surety which are expressly governed by U. S. C., Tit. 39, Sec. 40, discussed above.

The Act of July 31, 1894, 28 Stat. 207, § 8, governs only the relations of the Comptroller General and the Executive Departments. See note in U. S. C. A., Tit. 31, p. 13. The ambiguity in the Act as set forth in U. S. C., Tit. 31, Sec. 74, results from the substitution of "General Accounting Office" for "Auditors" and "Comptroller General" for "Comptroller of the Treasury." The substitution was no doubt made because of the Budget and Accounting Act of June 10, 1921, 42 Stat. 24, U. S. C., Tit. 31, Sec. 44.

statutory regulation the courts should be slow to imply an authority to sue without the consent of the United States.*

These considerations have been deemed sufficient reason to deny private persons the privilege of suing on official bonds in their own right. In *Fosmire* v. *National Surety Company*, 229 N. Y. 44, an action was brought by a laborer to recover wages from his employers, contractors for the construction of a state highway, on their bond executed under the Highway Law of New York. The conditions of the bond were that the contractors pay the wages of their laborers, perform the work faithfully and on time, and protect the state against all excess costs or damages occasioned by the work. Even though the bond was clearly intended to cover payment of wages, the right to maintain the suit was denied. Speaking for the Court, Judge Cardozo declared:

> We think the cause of action is in favor of the People solely [citing cases]. In so holding, we put our decision upon the single ground that the bond, read in its entirety, is inconsistent with an intention that the plaintiff and others in like

* The brief of petitioner sets forth excerpts from the letter of Assistant Attorney General in response to petitioner's request that the Government consent to the maintenance of this action. No indication of omissions is given. See Brief of petitioner, pp. 162–163. In order that the Court may have the full text, the letter is set forth in Appendix C, *infra*, p. 36, especially because of the emphasis which petitioner attaches to the language selected for quotation to support a claim that the United States has no interest in this litigation. Particular attention is directed to the last two paragraphs of the letter.

position should have the right to sue upon it. If that intention is absent, the right to sue will be denied [citing case]. * * * The dominant purpose of this bond was protection to the state. That is plain alike from its terms and from those of the statute which required that security be given (Highway Law, *supra*). This dominant purpose will be defeated if laborers may ignore the People, and sue in their own right. They may then sue for wages as often as there is default, and exhausting the penalty of the bond, leave nothing for the state. * * * The state did not intend to make the employees of its contractors the beneficiaries of a cause of action to be enforced in hostility to its own. There is nothing far-fetched or visionary in the danger that would follow the recognition of such competing claims of right. * * *

The plaintiff fails, therefore, to establish that he and his fellow laborers were the donees of a right to sue. * * * The concession of such a right would do more than frustrate the purpose of the bond. It would frustrate the purpose of the statute which directed that a bond be given. The statute does not permit, and the Commission in exacting the bond did not intend, that the security should be exhausted at the instance and for the benefit of persons other than the state itself. * * *

These observations apply with equal force to the bond involved in this suit. The United States is the sole obligee. Unless authority can be drawn from the statute requiring the giving of the bond, no one other than the obligee may sue. *Corporation of Washington* v. *Young*, 10 Wheat. 406; *Howard* v. *United States*,

184 U. S. 676, 691; *District of Columbia, to Use of Langellotti* v. *Fidelity & Deposit Company*, 271 Fed. 383 (App. D. C.); see *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U. S. 220, 231, 234; *Munroe* v. *Raphael*, 288 U. S. 485, 488–489; *United States* v. *United States Lines*, 24 F. Supp. 427 (S. D. N. Y.).

The statutes requiring postmasters' bonds contain no express statutory consent to suits by private persons, although the Congress has given such consent in the case of certain bonds required of marshals, consuls, bankruptcy officials, and contractors.[7] We submit that no authority to sue may be implied.

The "dominant" and, we believe, the sole purpose of the bond is to protect the interest of the United States. The importance of such bonds as security for the proper performance of the postmaster's duties is evident from the extent to which public property and funds are entrusted to postmasters in the performance of their official duties.[8] As appears on the face of the bond in suit, a postmaster is a "fiscal agent" of the United States. In that capacity he is responsible for deposits in the postal savings, for funds transmitted pursuant to money orders, for stamp accounts of the post office, and for the salaries of postal employees.[8] As evidence

[7] U. S. C., Tit. 28, sec. 500; U. S. C., Tit. 22, Sec. 78, 103; U. S. C., Tit. 11, Sec. 78 (Supp.) (bankruptcy); U. S. C., Tit. 40, Sec. 270. The express provision for private suit on a marshal's bond was adopted in 1806 (Act of April 10, 1806, 2 Stat. 373) apparently in response to a suggestion of the Attorney General that such provision was desirable, even if unnecessary. See 1 Op. Atty. Gen. 92 (1800).

[8] These responsibilities by no means exhaust the duties of a postmaster which include the handling, custody, or disburse-

of the magnitude of the postmaster's accounts it is sufficient to note that domestic money orders alone were issued in the amount of over $2,000,000,000 (see Annual Report of the Postmaster General for fiscal year ended June 30, 1938, p. 170).

The detailed provisions established by the Congress and the Postmaster General with respect to postmasters' bonds make it evident that such bonds are relied upon as the Government's principal security against deficiencies in postmasters' accounts. Provision is made, for example, for the periodic examination and renewal of official bonds (Postal Laws and Regulations, Sec. 69, 414); penalties are provided for the failure of postmasters to render accounts (*id.*, sec. 269); the liability of sureties in the event of a vacancy in the office of postmaster is defined (*id.*, sec. 415, 416); and the rates and financial and legal responsibility of sureties are regulated (*id.*, 70–72).[*] See Appendix A, p. 24.

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ment of other public funds or property, as is indicated by Appendix B, p. 34.

[*] Bonds are required also of other post-office employees having authority to disburse public funds (*id.*, sec. 27 (1); Sec. 10 (7); sec. 472, 473 (6), (7)) and all postal employees authorized to sign checks (*id.*, sec. 422).

The extent of reliance on the postmaster's bond is evidenced by note to Section 473 of the Postal Laws and Regulations covering the bonds of certain assistant postmasters and postal employees:

"The taking of bonds by the United States directly from assistant postmaster and clerks in post offices does not in anywise affect the liability of postmasters upon their official bonds for the proper discharge of all the duties of their office and the due accounting for all public funds which may be in, or come into, their

The Postal Laws and Regulations indicate also that the Government alone was intended to be protected. Thus notice must be given to the surety by the Postmaster General when a deficiency is discovered in the accounts of the postmaster, whereas no provision is made with respect to notice of claims of private patrons (*id.*, sec. 283 (2) U. S. C., Tit. 39, sec. 37). Likewise, the statutory period within which suit may be brought on the surety bond applies only to actions on account of indebtedness to the United States. (*Id.*, sec. 298 (1)).[19]

The letters from the Chief Inspector of the Post Office Department and from the Acting Comptroller General prepared for the information of the Court and attached to this brief as Appendices D and E show that a substantial percentage of the annual collections made by the United States on account of defaults or defalcations of postmasters are recovered from the surety, that the recovery may exhaust the amount of the bond,

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custody as postmaster; and postmasters and their sureties are responsible on their official bonds to the same extent as theretofore for the defaults and defalcations of their subordinates. *The bonds taken from assistants and clerks in post offices are simply additional security of which the United States may avail itself in case of loss.*" [Italics supplied.]

This note has appeared in all editions of the Postal Laws and Regulations since 1902. Edition of 1902, sec. 313; ed. of 1913, sec. 317; ed. of 1924, sec. 355; ed. of 1932, sec. 473, note.

[19] The provisions of the Postal Laws and Regulations requiring bonds of certain assistant postmasters and cashiers "and when deemed necessary by the Postmaster General for the better protection of the interests of the Government any other employees in such offices" is also some indication that the Congressional legislation in this field was intended to protect the Government alone (*id.* sec. 472; U. S. C., Tit. 39, sec. 132).

and that, in some cases, losses are not discovered until long after the default or defalcation occurred. These facts not only bear witness to the importance of these bonds as security to the United States but also indicate the administrative difficulties which would attend the adoption of a doctrine permitting private suit without the consent of the United States.

The fact that the value of the postmaster's bond as security to the United States may be substantially impaired is sufficient ground for denying private individuals the right to sue without the consent of the United States on claims of the character and amount asserted here. But procedural considerations also point to the conclusion that such actions should not be allowed. Thus, Section 816 of the Regulations of the Post Office Department (see Appendix A) establishes a complete and systematic procedure for ascertaining the facts respecting loss to Post Office patrons and for the collection, by the United States, of damages for such losses. The determination of the Chief Inspector of the Post Office Department on the question whether any regulation has been violated would be entitled to substantial weight in a judicial proceeding instituted by the United States for the recovery of private losses. Cf. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 509; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Decatur* v. *Paulding*, 14 Pet. 497, 515. If, however, suits may be brought by private persons to enforce private claims directly, the departmental examination and determination may not be available as an aid to the court, since Section 816, although it permits the private claimant to submit his claim in advance to the Post Office Depart-

ment, does not require him to do so.[11] It is difficult to believe that Congress, in merely requiring bonds for the Government's protection, contemplated that private individuals would thereby be enabled, by bringing actions directly on such bonds, to require the courts to make independent determinations of questions affecting the day to day administration of the Post Office Department. Certainly the Post Office Department has not so construed the statute.

The regulatory scheme for the determination and enforcement of private claims has been devised on the assumption that the responsibility for investigation and recovery rests with the Government and cannot easily be reconciled with allowance of private actions. Thus Section 813 (1), (2), (4) of the Postal Laws and Regulations requires postmasters to report all claims to the appropriate departmental officials and forbids them to compromise any such claims. The obvious purpose of these provisions is to apprise the Department of maladministration in any of the post offices throughout the United States. If a postmaster may be sued directly by private individuals it is difficult to see how the prohibition against compromise can be enforced. And certainly the regulation plainly shows that the postal laws are administered on the assumption that private actions cannot be maintained.

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[11] The potential importance of this consideration is evident from the fact that the petitioner devotes much of its brief to an effort to show that the misdelivery of its mail was a violation of postal regulations.

It is evident from the face of Section 777 of the Postal Laws and Regulations that the postmaster is authorized to exercise considerable discretion where mail is claimed by a person other than the addressee. See Appendix A, p. 24.

Long experience under the statute indicates that the interests of private parties may be adequately protected without resort to the procedural innovation of private suit.[12] The United States has often instituted suits on postmasters' bonds after investigation under Section 816 of the Postal Laws and Regulations when necessary to obtain recovery for such losses. See *infra*, page 32. The paucity of cases in which private parties have sought to sue without the consent of the United States is itself strong evidence that there is no need for the remedy of private suit.[13]

The few courts which have passed on the question involved here have held that a private suit may not be maintained. *Wile* v. *United States Fidelity & Guaranty Company*, 6 Alaska 48; *Idaho Gold Reduction Company* v. *Croghan*, 6 Idaho 471, 56 Pa. 164; see *United States* v. *Griswold*, 8 Ariz. 453, 457; 76 Pac. 596, 597. A persuasive analogy is furnished by the cases denying a private user of the mails the privilege of suing a mail contractor for breach of contract of carriage with the United States. *German Alliance Insurance Company* v. *Home Water Supply Company*, 226 U. S. 220, 231; *United States* v. *United States Lines Company*, 24 F. Supp. 427 (S. D. N. Y.).

[12] Substantially the same statutory requirement has been in effect at least since 1825. Act of March 3, 1825, 4 Stat. 103.

[13] It is not suggested that the Post Office Department would aid in the collection of claims of the character asserted here. In all probability, the Department would refuse to proceed against the postmaster or surety in such cases for the reasons advanced in this brief, see Appendix D, p. 38.

Howard v. *United States*, 184 U. S. 676, does not sustain the petitioner's position. In that case the plaintiff sued to recover funds tendered to him in another action and deposited with the clerk of the court. The clerk died without accounting to the plaintiff. With the consent of the circuit court which had appointed the clerk, the plaintiff brought suit in the name of the United States, but for his own use, against the sureties on the clerk's bond. The United States was the obligee of the bond, which was conditioned upon the faithful performance of the duties of the office and the seasonable recording of "decrees, judgments, and determinations of the court." The plaintiff's right to maintain the action was upheld.

This Court pointed out that the bond in that case was intended to cover loss to private litigants as well as loss to the Government. The Court stressed the predominance of private litigation in the federal courts (id. p. 687); the "practice of a century" with respect to clerk's bonds (id. 687); and the specific reference in the statute to the duty of recording the court's decrees and judgments (id. 687, 692), a duty which was obviously imposed for the private suitors' benefit. In the absence of a statute forbidding suit, the right to sue was deemed to follow from the conclusion that the bond was intended to protect private litigants (id. pp. 692, 694).

It is doubtful that postmasters' bonds cover any loss in which the United States has no legal interest. There are cases permitting the United States to recover the full value of private property lost or damaged in the

mails [13] regardless of the amount, if any, for which the property was insured or registered, even though the United States is not liable for the loss." [14] But in these cases the recovery has been limited to the value of the property lost or damaged, and the right of the United States to recover has been rested on the ground that the United States, as bailee, has a special property right in the mails, entitling it to recover the full value of such property in the event of loss. The principles which govern such decisions are inapplicable to a claim for consequential damages in which the United States obviously has no legal interest.

Even if it be assumed, however, that postmasters' bonds are intended as direct security for private losses, the *Howard* case furnishes no authority for this suit. The "dominant" purpose of the clerk's bond involved in the *Howard* case was evidently to protect private litigants, to whom the clerks were held to have a "pecu-

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[13] *National Surety Company* v. *United States*, 129 Fed. 76 (C. C. A. 8th); *American Surety Company* v. *United States*, 133 Fed. 1019 (C. C. A. 5th); *United States* v. *American Surety Company*, 163 Fed. 228 (C. C. A. 4th); *United States* v. *American Surety Company*, 155 Fed. 941 (N. D. Ill.); *Gibson* v. *United States*, 208 Fed. 534 (C. C. A. 1st); *United States Fidelity & Guaranty Co.* v. *United States*, 229 U. S. 397 (C. C. A. 8th); *United States Fidelity & Guaranty Company* v. *United States*, 246 Fed. 433 (C. C. A. 9th); *United States* v. *United States Fidelity & Guaranty Company*, 247 Fed. 16 (C. C. A. 6th); *United States* v. *Griswold*, 8 Ariz. 453; *cf. Mass. Bonding & Insurance Company* v. *United States*, 54 Fed. (2d) 1039 (C. C. A. 7th).

[14] The Act of June 28, 1902, 47 Stat. 338 (U. S. C., Tit. 39, secs. 381, 381a, 384, 384a), requires the full value of registered or insured mail to be declared unless otherwise prescribed by the Postmaster General, and provides that "any claim for indemnity in any suit involving such mail, when the full value knowingly and wilfully was not stated at the time of mailing, shall be invalid." (U. S. C., Tit. 39, Sec. 381a).

liar relation" (*id.* 694). The United States did not indicate in that case that the maintenance of the action would jeopardize its interests, and the Circuit Court, which had appointed the clerk, approved the sureties and fixed the amount of the bond, had given its consent to the suit. The opinion expressly declares that the decision has no application where the bond is given "primarily" to protect the United States (*id.* 691). On this ground, the Court distinguished *Corporation of Washington* v. *Young*, 10 Wheat. 406, in which "the first bold adventurer" was denied the right to sue on an official bond without the Corporation's consent. The action in that case was to recover prize money on the bond of the manager of a lottery drawn to effect a public improvement. Moreover, in the *Howard* case the Court found that the Government's interest in clerks' bonds could be protected by enlarging the penalty (*id.* 690). Such protection, as we have shown, is not available against the consequential damage asserted in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX A

POSTAL LAWS AND REGULATIONS

SEC. 69. Every officer required by law to take and approve official bonds shall cause the same to be examined at least once every two years for the purpose of ascertaining the sufficiency of the sureties thereon; and every officer having power to fix the amount of an official bond shall examine it to ascertain the sufficiency of the amount thereof and approve or fix said amount at least once in two years and as much oftener as he may deem it necessary.

2. Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor. The nonperformance of any requirement of the provisions of sections 1 to 3 of this title, or of that part of section 27 of Title 19 relating to transmitting copies of oaths to the Secretary of the Treasury, on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States. The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal. Nothing in said sections

shall be construed to repeal or modify section 38 of Title 39: *Provided,* That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a compliance with the requirement for the renewal of such bonds within the meaning of sections 1 to 3 of this title. (U. S. C., tit. 6, sec. 2, 3).

SEC. 70. Wherever, by the laws of the United States, or regulations made pursuant thereto, any person, firm, or corporation is required to furnish any recognizance, stipulation, bond, guarantee, or undertaking, United States Liberty bonds, or other bonds of the United States, will be accepted by the Post Office Department in lieu of individual or corporate sureties in accordance with the general regulations of the Department of the Treasury set out in circular No. 154 of that department, based upon the authority of section 1126 of the revenue act approved February 26, 1926.

SEC. 71. Official bonds, contracts, and undertakings executed by a company authorized to do business under the provisions of sections 6 to 13 of the United States Code, Title 6, will be accepted, provided such company is incorporated and has its principal office within the State or Territory or District of Columbia, or has an agent upon whom process can be served within the United States judicial district wherein the suretyship is to be undertaken.

2. Whenever any official bond or undertaking is required to be given with two or more personal sureties, the execution thereof solely by a surety company shall be sufficient.

3. No officer of the Post Office Department or Postal Service shall require or exact the execution of any official bond, contract, or undertaking by a surety company, or by any particular surety company.

4. Until otherwise provided by law no bond shall be accepted from any surety or bonding company for any officer or employee of the United States which shall cost more than thirty-five per centum in excess of the rate of premium charged for a like bond during the calendar year nineteen hundred and eight. The United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States. (U. S. C., Tit. 6, sec. 14.)

5. On every bond of an officer or employee of the Postal Service accepted from any surety or bonding company there shall appear a certificate, signed by the person signing for the surety or bonding company, stating the amount of the premium per $1,000 on said bond and the rate of premium charged by said company for a like bond during the calendar year 1908, where such bonds were issued by said company during that year. If no such bond was issued during said year, that fact shall be stated.

SEC. 72. No company having authority under the provisions of sections 6 to 13 of the United States Code, Title 6, to do business with the United States shall be accepted as sole surety on any recognizance, stipulation, bond, or undertaking under this department the penal sum of which is greater than 10 percent of the paid-up capital and surplus of such company.

2. Two or more companies may be accepted as sureties on any recognizance, stipulation, bond, or undertaking under this department the penal sum of which does not exceed the limit herein prescribed of their aggregate paid-up capital and surplus; and in such cases each company may limit its liability, in terms, upon the face of the bond, to a definite specified amount, such amount to be in all cases, however, within the limitations herein prescribed. In cases where the law ex-

pressly or impliedly requires or contemplates it, every such recognizance, stipulation, bond, or undertaking shall be executed by the principal and sureties jointly and severally.

3. No company shall be accepted as surety on any recognizance, stipulation, bond, or undertaking under this department which shall execute any recognizance, stipulation, bond, or undertaking on behalf of any individual, firm, association, or corporation, whether or not the United States is interested as a party thereto, the penal sum of which is greater than 10 per cent of the paid-up capital and surplus of such company, except under the conditions and limitations herein prescribed.

4. No portion of any recognizance, stipulation, bond, or undertaking shall be included in determining the limitations herein prescribed which shall have been reinsured at the time of execution and delivery of the original obligation, or within 20 days thereafter, in a company authorized to do business under the act above referred to, within the limitations herein prescribed, or in such companies and under such limitations as the Secretary of the Treasury shall have approved: *Provided,* That on every such recognizance, stipulation, bond, or undertaking in which the United States is interested as a party, the reinsurance agreement shall be executed simultaneously with the original obligation by a company authorized to do business under the act of August 13, 1894, and shall run directly to the United States.

5. The amount of paid-up capital and surplus of every such company shall be determined by the annual and quarterly financial statements filed with the Secretary of the Treasury as herein provided, or by reports upon current examinations made by the insurance departments of the several States or by the Attorney General of the United States. The Secretary of the

Treasury will keep the other executive departments advised, from time to time, as to the status and qualifying power of the various companies under these instructions.

6. In the event that it becomes necessary to waive the limitations herein prescribed on any recognizance, stipulation, bond, or undertaking given to the United States, notice of such waiver and the manner in which the excess is required to be covered shall in each instance be immediately transmitted by letter to the head of each of the other executive departments.

7. Failure on the part of any company to comply with the provisions of these regulations will be considered sufficient ground for refusing to accept further such company as surety on obligations under this department during the continuance of such delinquency, and in the event of persistent failure to observe the provisions of these regulations the name of any such company will be eliminated from the published list of securities acceptable to this department.

SEC. 269. Whenever any postmaster neglects to render his accounts for one month after the time, and in the form and manner prescribed by law and the regulations of the Postmaster General, he and his sureties shall forfeit and pay double the amount of the gross receipts at such office during any previous or subsequent equal period of time; and if, at the time of trial, no account has been rendered, they shall be liable to a penalty of such sum as the court and jury shall estimate to be equivalent thereto, to be recovered in an action on the bond (U. S. C., tit. 39, sec. 44).

SEC. 415. Whenever the office of any postmaster becomes vacant, the Postmaster General or the President shall supply such vacancy without delay, and the Postmaster General shall promptly notify the General Accounting Office of the change; and every postmaster and

his sureties shall be responsible under their bond for the safekeeping of the public property of the post-office, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibility by giving notice, in writing, to the Postmaster General, such termination to take effect ten days after sufficient time shall have elapsed to receive a reply from the Postmaster General; and the Postmaster General may, when the exigencies of the service require, place such office in charge of a special agent (post-office inspector) until the vacancy can be regularly filled; and when such special agent shall have taken charge of such post office, the liability of the sureties of the postmaster shall cease (U. S. C., tit. 39, sec. 38).

SEC. 414. Postmasters shall furnish new bonds whenever deemed necessary by the First Assistant Postmaster General; also upon the death, insolvency, or other disability of one or more of the personal sureties on the postmaster's bond, or whenever any postmaster under bond with personal sureties shall have remained in office for four years from the effective date of his last official bond. (See sec. 69.) Postmasters shall promptly report to the department the death, insolvency, or other disability of a personal surety, and failure to do so will be deemed sufficient cause for removal.

SEC. 416. Whenever the office of a postmaster becomes vacant through death, resignation, or removal, the Postmaster General shall designate some person to act as postmaster until a regular appointment can be made by the President in case the office is in the first, second, or third class, and by the Postmaster General when the office is in the fourth class; and the Postmaster General

shall notify the General Accounting Office of the change. The postmaster so appointed shall be responsible under his bond for the safekeeping of the public property pertaining to the post office and the performance of the duties of his office until a regular postmaster has been duly appointed and qualified and has taken possession of the office. Whenever a vacancy occurs from any cause the appointment of the regular postmaster shall be made without unnecessary delay . . . (U. S. C., tit. 39, sec. 39).

SEC. 777. Mail matter should be delivered to the person addressed or in accordance with his written order. When the addressee habitually sends for or receives his mail through his clerk, servant, agent, or some member of his family, and recognizes or acquiesces in such delivery, no written order need be required.

2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. Ordinary letters bearing the word "Personal" in connection with the address shall be delivered as other mail for the addressee is delivered.

3. A letter addressed to a person imprisoned to await trial, upon indictment or pending indictment, shall be delivered in accordance with the order of the person addressed. In the absence of an order the mail may be delivered to the sheriff or officer having charge of the prisoner.

4. When a postmaster is in doubt as to the identity of the addressee he may require proof, and shall exercise great care to make proper delivery, especially where mail matter appears to be of value.

5. Where two or more persons of the same name receive mail at the same office the postmaster shall advise

them to adopt some address or means by which their mail may be distinguished. Postmasters may deliver such matter according to their best judgment, and shall not return it to the mailing office for better description of the addressee until after inquiry they are unable to determine to whom it should be delivered.

6. Mail matter addressed to a person in care of another shall be delivered to the addressee, if he so direct, and not to the person to whose care it is addressed. In the absence of such direction it shall be delivered to the first of the two persons who may call for it (see Sec. 778).

7. Mail matter addressed to several persons may be delivered to any one of them.

8. Mail matter addressed to a public official or to an officer of a corporation by his official title shall be delivered to the person actually holding the office designated in the address.

9. Neither husband nor wife can control the delivery of matter addressed to the other. When so instructed, a postmaster shall refuse to deliver mail to the husband which is addressed to the wife, or mail to the wife which is addressed to the husband. In the absence of instructions to the contrary the wife's mail should be placed with the husband's and delivered to him with his own, unless they be known to live separately.

10. A person engaged in a legitimate business may adopt a business name, and, when duly identified, may receive his mail, registered or ordinary, by that name as well as by his proper name.

11. Any number of citizens may employ an agent and give him a written order on the postmaster for their mail; and when such order is presented to the postmaster the mail for such parties, and also mail addressed to a person in care of any such parties, shall be delivered to the agent named.

12. Mail matter of patrons of a post office shall, at their request, be delivered to a star or rural carrier to be carried out of the mail and handed to them on his route before he passes another post office.

13. In all cases of dispute as to the person or persons to whom mail should properly be delivered, where the postmaster is in doubt as to his duty under the regulations, he shall obtain written statements from the contending parties as to the grounds of their claims, and submit such statements, with a full report of his own, to the Solicitor for the Post Office Department, for advice in the premises.

SEC. 816. The loss, rifling, damage, wrong delivery of, or depredation upon registered or other mail, and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.

2. When the Chief Inspector finds that the facts ascertained in connection with such an investigation establish the responsibility, by reason of fault or negligence, of a postal employee or mail contractor or an agent or employee thereof, the Chief Inspector shall demand the amount of the loss from such employee or contractor.

3. The Chief Inspector in such cases shall communicate the facts to the officer having charge of the employee or service with information of any collection made or contemplated, for consideration of the advisability of imposing fine or of taking other disciplinary or corrective measures. The amount of the fine or the character of disciplinary action taken or proposed to be taken shall upon request be reported to the Chief Inspector by such officer.

4. When collection is made under the provisions of this section a receipt shall be given on a form furnished by the department showing the amount, the case num-

ber, a description of the mail, and the grounds on which the collection is based.

5. If after payment the propriety of the collection is questioned, the matter may be taken up by the person from whom the collection was made through his superior officers, but this shall be done within 30 days from the date of the collection. Any statement which it is desired to submit shall be forwarded promptly through official channels to the office having the employee or service in charge for transmission to the Chief Inspector; at the same time the officer with whom it is originally filed shall immediately notify the Chief Inspector that a statement has been submitted. Unless the Chief Inspector sustains the propriety of the collection, the money shall be returned. This information shall be printed on the receipt mentioned in paragraph 4.

6. If full recovery is not made and the Chief Inspector determines that further proceedings should be had, he shall present the facts to the Solicitor for the Post Office Department for advice as to the advisability of suit by the United States for recovery of the amount involved. Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.

7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear.

8. If the facts ascertained by the Chief Inspector establish an irregularity for which indemnity may be payable and recovery cannot be made without materially delaying the settlement of the indemnity claim, he shall transmit the papers to the officer charged with consideration of such claims for certification or rejection.

APPENDIX B

SOME SECTIONS OF THE POSTAL LAWS AND REGULATIONS IMPOSING DUTIES ON POSTMASTERS RELATING TO THE PROPERTY AND FUNDS OF THE UNITED STATES

Section 58: Providing for the responsibility of postal employees for Government property lost or damaged through their fault.

Sections 105–117, 119–126, 128–130: Providing in great detail for the care, deposit, accounting, and transmission of the public moneys, collected by postmasters, or coming into their possession.

Sections 137, 138, 139, 143, 145, 148, 149, 150, 151, 579, 765: Dealing with the postmasters' duties concerning stamps, stamped envelopes and paper, and mailing matter without postage stamps affixed.

Sections 152–155: Accounting by postmasters for stamps and stamp paper charged to them, and for redeemed stamps.

Sections 156–157: Duties with respect to internal revenue stamps, and Government securities.

Sections 228, 234, 235, 236, 237, 238, 239, 242, 1778: Prescribing the duties of the postmaster as a disbursing officer.

Sections 106, 443: Holding the postmaster responsible for loss of Government funds or property if he fails to exercise due care.

Sections 474–480, 482–3: Expenditures of postmasters for leases, supplies, letter boxes, etc.

Section 584: Duties of postmasters with respect to refunds of overcharges on mail matter.

Sections 1369–70: Duties of postmasters with respect to registered matter, and their responsibility for loss.

Sections 1408, 1426, 1430 (21), 1493–4, 1520–1: Dealing with the postmaster's responsibility for money-order funds.

Sections 1608, 1613–19, 1626–1627: Duties in connection with postal-savings funds.

Sections 1866–70, 1877, 1879–90, 1894–97: Duties concerning the care of mail bags, locks and keys, and responsibility for their loss or injury.

Sections 2230 (15, 16), 2231 (8, 9, 11): Collections of customs duties by postmasters.

APPENDIX C

JWM:WSW WSW:mm
78-39-4 SEPTEMBER 22, 1936.

LEONARD, STREET & DEINARD,
Attorneys at Law, Andrus Building,
Minneapolis, Minnesota.

SIRS: Receipt is acknowledged of your letter of July 15, 1936, requesting the Attorney General to grant leave to you to bring suit against the bond of Patrick J. Malone, Acting Postmaster at Montgomery, Minnesota, on behalf of your client, the Midland Loan Finance Company of Minneapolis.

It is alleged that this company was defrauded to the extent of $40,000 by reason of a collusive agreement between the Acting Postmaster and one Thomas Hunting, an automobile dealer of Montgomery, Minnesota, in accordance with which fraudulent scheme the Acting Postmaster delivered mail posted by the Finance Company to Hunting, regardless of the names to which such mail was addressed, and as a result of which the Finance Company was prevented from discovering the fact that many of Hunting's contracts which it financed were forged.

This is not a case in which the right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as stated by you, the claim is the exclusive property of your client and can be asserted only by your client. It is, therefore, unlike the case of United States ex rel. Brimberg Bros. v. Globe Indem-

nity Company, 26 F. (2d) 191, referred to in your letter.

The bond of the Acting Postmaster was executed in accordance with the provisions of R. S. 3834, as amended, U. S. C., Title 39, Section 34. Whether the sureties on a bond executed in accordance with the provisions of this Section are liable to your client on a claim of the nature stated by you, is a question of law which would not be affected by any action of the Attorney General.

As to the merits of the case, I am advised that the Post Office Department after a thorough investigation of the facts has exonerated the Acting Postmaster and his subordinates from any guilt in the matter.

In these circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it; and further, that in view of the exoneration of the Acting Postmaster by the Post Office Department, it would seem improper for the Attorney General to take any action which would appear to sanction the suit.

Respectfully,

(Signed) JAMES W. MORRIS,
Jas. W. Morris,
Assistant Attorney General.
(For the Attorney General).

APPENDIX D

Division of
Financial Investigation

In Reply Refer to:
76107–C

POST OFFICE DEPARTMENT,
CHIEF POST OFFICE INSPECTOR,
Washington, January 3, 1940.

The Honorable THE SOLICITOR GENERAL,
Department of Justice.

MY DEAR SIR: This is in response to your letter of December 26, 1939, inquiring whether a substantial part of the collections made annually by the Post Office Department on account of deficiencies in postmasters' accounts are obtained from sureties.

In cases involving public funds and the Government's indemnity liabilities, the portion collected from sureties is about 25 percent of the combined recoveries from postmasters, employees, and sureties, whereas, in cases involving ordinary mail, with no indemnity liability, the part collected from sureties is approximately 40 percent.

You inquire also:

> (a) Whether there are large numbers of claims for consequential damages resulting from delay or misdelivery of the mails in addition to the usual claims for property lost in or stolen from the mails.

It has never, so far as can now be determined, been the policy of the Department to recognize claims for consequential damages, as distinguished from claims for the value of the material contents of mail matter. This

position of the Department is so thoroughly understood throughout the postal service that practically any responsible officer to whom such a claim was presented would reject it, and there is therefore no centralized record or consolidated experience affording any indication of the volume or size of such claims. However, there has been sufficient experience to indicate that if recovery were allowed, such claims would frequently be made and for large sums.

In our opinion, adequate provision could not be made for such claims in fixing the penalty of the bond. At the present time, provision is made for the usual case of loss or damage to private property in the mails on the basis of past experience. The damages in such claims are usually quite small. For example, the average sum collected in the fiscal year 1939 in cases involving the intrinsic value of mail matter was only $38.64. The Department's experience with respect to claims for consequential damages, while limited, has been sufficient to indicate that damages of such character are frequently large and unpredictable. In our judgment, there is no practical basis upon which to estimate such losses in fixing the penalty of the bond.

If the senders of mail matter were permitted, without the consent of the Department, to sue on bonds of postal employees, the penalties of many bonds would become obligated for the satisfaction of private claims, leaving the Department without surety protection for the public funds, property, and intrinsic value of mail matter in the custody of the principals. Where consequential damages are involved, the amounts claimed are likely, moreover, to run far in excess of the intrinsic value of the mail matter; for example, the amount claimed in this case, $16,000, may be compared with the average sum of $38.64 collected during the fiscal year 1939 in all cases involving the intrinsic value of mail

matter. Actions, whether for direct or consequential damages, pressed by private persons lacking appreciation of postal operating conditions, would, if permitted, harass postal employees and interrupt their attendance upon official business and thereby interfere with the Postmaster General's management of the postal establishment.

Very truly yours,

K. P. ALDRICH,
Chief Inspector.

APPENDIX E

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, January 3, 1940.

B–7810.

Re *United States of America, for the Use and Benefit of Midland Loan Finance Co., a Corporation, Petitioner,* v. *National Surety Corp., a Corporation, and Patrick J. Malone.* Sup. Ct. No. 236.

THE ACTING SOLICITOR GENERAL,
Department of Justice.

SIR: I have your letter of December 26, 1939, requesting that you be furnished information for use in connection with the above case as to "the extent to which (a) the Post Office Department Division of the General Accounting Office collects from the sureties on these bonds in order to make up deficiencies in postmasters' accounts; (b) the recovery from the surety, either by reason of legal action or voluntary payment, exhausts the penalty of the bond; and (c) deficiencies in a postmaster's accounts are discovered long after the default or defalcation occurred."

In reply you are advised that the Chief of the Postal Accounts Division of this office has reported the facts to be as follows:

(a) During the quarter ended June 30, 1939, sureties on the bonds of former postmasters deposited to the credit of their principals $15,805.15 in 87 cases. These amounts ranged from $3.14 to $2,768.26. Using these figures as a basis, it is esti-

mated they would deposit during a year approximately $54,200 in 300 cases. The total amount actually deposited to the credit of former postmasters during the fiscal year 1939, from all sources, was $126,265.85.

(b) The accounts of the 183 postmasters who went out of office during the fiscal years 1935, 1936, 1937, and 1938, on which there were balances due the United States on March 31, 1939, showed that at that time the sureties had deposited the full penalty of the bond on thirteen of said accounts.

(c) There are cited the following recent cases of deficiencies in former postmasters' accounts which were not found and reported until some time after they occurred:

(1) A postmaster went out of office June 26, 1938, with a balance due the United States on account of an alleged loss by burglary June 1, 1938. The Postmaster General disallowed the claim June 30, 1939, under the act of March 17, 1882, 22 Stat. 29, as amended.

(2) A postmaster went out of office May 6, 1938. Under date of February 27, 1938, the Postmaster General issued an order to charge his account with $2,959.53 as illegal commissions on cancellations of stamps during the fiscal years 1928 to 1938, inclusive, under the act of June 17, 1878, 20 Stat. 141, as amended by the act of June 18, 1934, 48 Stat. 989. Similar cases are numerous.

(3) There have been many cases where postmasters have had funds on deposit in a bank when it closed. In such cases dividends have been paid from time to time over a number of years and the surety companies have refused to pay any

amount until the final dividend had been received and the balance due the United States could be definitely determined.

It may be noticed that postmasters' accounts are "running" accounts, the amount due the United States being determined at the conclusion of the postmasters' services when the account is finally settled. *Jones v. United States*, 7 How. 681, 692; *United States v. Cash et al.*, 293 Fed. 584.

The money-order business was established in 1865, and at present all post offices (44,400) issue and pay domestic money orders. As money orders are payable by postmasters for one year from the last day of the month of issue (act of January 27, 1894, 28 Stat. 32), considerable time elapses before all money orders issued by a postmaster are paid and received in this office and verified. At the time of verification of the last list of money orders issued, rendered by a former postmaster, there may be a number of money orders outstanding and unpaid, and claims for payment thereof may be received several years later. See act of May 27, 1908, 35 Stat. 416.

It is questionable whether a postmaster's account can be considered "closed" by audit and settlement until all outstanding money orders are received and verified with the record required by law to be kept by this office.

Respectfully,

R. N. ELLIOTT,
Acting Comptroller General of the United States.

U. S. GOVERNMENT PRINTING OFFICE 1940

SUPREME COURT OF THE UNITED STATES.

No. 236.—October Term, 1939.

United States of America, for the use and benefit of Midland Loan Finance Company, Petitioner, *vs.* National Surety Corporation and Patrick J. Malone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 5, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

The question presented is whether petitioner, a private user of the mails, may without the consent of any officer of the United States bring suit on the bond of an acting postmaster for consequential damages resulting from misdelivery of mail. The Circuit Court of Appeals for the Eighth Circuit affirmed a judgment of the District Court for the District of Minnesota dismissing petitioner's complaint.[1] We granted certiorari[2] because of an alleged conflict with a decision of this Court[3] and because an important question in the administration of the postal laws was involved.

The complaint alleged that petitioner was engaged in the business of automobile financing in Minneapolis, in the course of which it purchased from automobile dealers the installment notes of buyers secured by their sales contracts. A dealer living at Montgomery, Minnesota, where the respondent Malone was acting postmaster, is alleged to have put into operation a scheme to defraud petitioner by selling it forged notes and contracts, which he sent petitioner along with a fictitious list of credit references. Petitioner, before purchasing, followed its usual practice of mailing letters of inquiry to the references, and after purchasing mailed payment books, insurance certificates, and receipts to the purported makers of the notes. The dealer persuaded the acting postmaster Malone, al-

[1] 103 F. (2d) 450, affirming, 23 F. Supp. 411.

[2] 308 U. S. —.

[3] Howard v. United States, 184 U. S. 676.

legedly in violation of the Postal Regulations,[4] to turn over to him all letters that arrived in Montgomery in petitioner's envelopes. Then he sent forged replies to petitioner's letters and made installment payments out of the money which petitioner had paid him in buying the notes. The dealer thus defrauded the Finance Company of some $34,000. The respondent Malone, on taking office as acting postmaster, had executed a bond for $16,000 to the United States as sole obligee with the respondent Surety Corporation as surety. The condition of the bond was:

> That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force.

In its complaint, without alleging specific authorization from the United States to sue, petitioner asked judgment on the bond for the defaults of Malone as postmaster. At the close of the testimony at the trial motions to dismiss the complaint were made by respondents and the district judge reserved judgment. After a jury verdict for petitioner the motions were granted. The Court of Appeals affirmed on the ground that a private user of the mails cannot maintain such an action as is here alleged without the consent of the United States, the obligee in the bond, and that no consent was given either by the statutes, expressly or by implication, or by any appropriate officer of the United States.

The respondent gave a statutory bond in compliance with an enactment of the Congress for the purposes specified in the statute.[5]

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[4] Postal Laws and Regulations (1932), § 777. "Mail matter should be delivered to the person addressed or in accordance with his written order . . . .

"2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. . . ."

[5] 39 U. S. C. § 34, Postal Laws and Regulations § 410:

"Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

As the bond is part of an integrated system of postal regulations, the determination of the parties authorized to sue upon it is a federal question governed by federal law.[6]

We agree with the Court of Appeals that there was no consent and that such consent is necessary. Consequently there is no occasion to determine whether the bond was intended to protect private users of the mail from all loss or damage, however consequential, occasioned by the postmaster.

The record shows the only effort made to secure consent of an officer was a request to the Attorney General for authority to sue. This was refused. Whether as a matter of right a third party may sue on the instrument for loss covered by an official bond running only to the statutory obligee depends upon the intention of the legislative body which required the bond. This intention may be evidenced by express statutory language or by implication. This was the rule announced in *Corporation of Washington* v. *Young*.[7] There a bond had been given to the Corporation of Washington, a municipality, by the manager of a lottery "truly and impartially to execute" his duties. Without the city's consent, the holder of a winning ticket sued on the bond. This Court said:

> No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the Legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment.

In *Howard* v. *United States*[8] this comment was made upon the *Young* decision:

> That case undoubtedly is authority for the proposition that, generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent.[9]

Such official bonds are often part of a general statutory plan for the operation of governmental activities. While all the activities of

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[6] James Stewart & Co. v. Sadrakula, No. 251, October Term 1939, decided January 29, 1940.

[7] 10 Wheat. 406, 409.

[8] 184 U. S. 676, 691.

[9] Cf. United States v. United States Lines Co., 24 F. Supp. 427; Moody v. Megee, 31 F. (2d) 117; United States *ex rel.* Brumberg Bros. v. Globe Indemnity Co., 26 F. (2d) 191, 193; Idaho Gold etc. Co. v. Croghan, 6 Idaho 471, 473; United States v. Griswold, 8 Ariz. 453, 456.

a government of course confer benefits on its citizens, frequently the benefits are incidental and unenforceable.[10] In the case of an official bond, even if its benefits are not incidental, it may well be that the legislative body is of the opinion that actions on the bond should be limited to the government in order to secure unified administration of claims.

We have recognized a similar need for a single control in regard to a sale bond required by a district court in an equity receivership. This Court in *Munroe* v. *Raphael*[11] had before it an injunction granted by a federal district court upon the motion of its receiver to rescind a consent to sue and forbid further proceedings in a suit in a state court in the name of the United States upon a sale bond of the estate in receivership. The sale bond had been given for assets purchased from the receiver. It ran to the United States only and guaranteed the payment of a certain percentage of indebtedness to all creditors of the estate. The suit had been instituted in the state court by one creditor, with permission of the district court obtained prior to the receiver's motion for injunction. This Court upheld the injunction on the theory that the bond, a part of the estate, remained within the control of the court and that to ensure ratable payments to all creditors one should not be permitted to carry on the litigation. In the opinion, it was declared: "Certainly no creditor could bring a suit in his own name on the bond, for his share of the purchase money. Nor could he institute such an action without leave of the District Court."[12]

Petitioner's attack is pointed at the application of the consent rule rather than at the rule itself. While with some other official bonds consent is given by express provision,[13] none is given in the postmaster bond statute. Petitioner urges that consent by

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[10] German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 231.

[11] 288 U. S. 485.

[12] *Ibid.* at 488; see District of Columbia, to Use of Langellotti, v. Fidelity & Deposit Co., 271 Fed. 383.

[13] 40 U. S. C. §270a-d (laborers and materialmen may sue on bond of contractor for government building); 22 U. S. C. § 103 ("any person injured" may sue on bond of consul); 22 U. S. C. § 78 (same as to bonds of consular officers acting as administrators in foreign countries); 22 U. S. C. §§ 170, 171 (same as to bonds of marshals of consular courts); 28 U. S. C. §§ 496, 500 (same as to bonds of U. S. marshals); 11 U. S. C. § 78(h) (same as to bonds of referees, trustees and designated depositories in bankruptcy); 7 U. S. C. §§ 247, 249 (same as to bonds of warehousemen under the Warehouse Act).

implication is given. Attention is called to the words "legal intendment" in the quotation from *Corporation of Washington* v. *Young* and to a comment upon the *Young* case in the *Howard* case that these words show that "consent may, under some circumstances, be assumed to have been given . . . . ."[14] These expressions are used to base an argument that the statutes and regulations of the postal service establish consent by intendment. The precedent chiefly relied upon for this position is the *Howard* case. This was a suit, without express consent of the United States, on a bond of a clerk of the district court, alleging breach by failure to pay over money deposited with the clerk in settlement of prior litigation. The bond was a statutory bond naming the United States as sole obligee and assuring that the clerk would faithfully discharge the duties of his office. This Court analyzed the statutory requirements and the "peculiar relation" of the clerk to the court to determine the intendment of the Congress as to the standing of the private litigant to sue on clerks' bonds. Consideration was given to the fact that "the great mass of litigation . . . has always been between individuals,"[15] that "the practice of a century" required a ruling that the bond covered them and that it could not be said of the clerk's bond, as it was said of the lottery bond, that it was given primarily for the governmental authority. This Court concluded that even though "generally speaking . . . in the absence of a statute" the obligation cannot be put in suit in the name of the obligee without his consent, the factors of custom, similarity of governmental and private use of the courts and the surrounding circumstances, in the absence of words declaratory of intention, evidenced an intendment to permit suit without consent on the clerk's bond. "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be held to be the legal intendment of existing statutory provisions."[16]

We conclude in the present instance, however, that circumstances, practice, statutes and regulations combine to forbid reading into

[14] 184 U. S. 676, 691.
[15] *Id.*, p. 687.
[16] *Id.*, p. 692.

this situation a "legal intendment" to permit suit without the consent of the United States. Assuming the bond declared upon here is intended to cover the users of mail service, its beneficiaries are legion in comparison with the users of a court's depository. Moreover, the United States has a very substantial interest in a postmaster's bond. The statutory duties of a postmaster require him to act as a fiscal officer for the government at his office. He is responsible for postal savings deposits, money orders, stamps, and salary disbursements as well as for the property of the service, buildings, mail bags and other equipment.[17] Such circumstances weigh against a holding that the Congress intended to let a private user of the mails, wronged by the principal of a postmaster's bond, sue wherever he might find defendants and gain for himself such priority on the bond as vigilance could obtain.[18]

Apparently it is not customary for the United States to consent to suit by mail users upon postmasters' bonds. No case has been called to our attention where such permission has been granted though the requirement for a bond has been in existence since 1825.[19] Rarely has a private individual sought recovery.[20] The contention of petitioner cannot be said to be supported by any continued administrative practice. On the other hand, the United States has undertaken repeatedly and successfully to recover on the bonds for the losses of mail users. Recovery has been allowed on the theory of a suit by a bailee for loss of property in his possession.[21]

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[17] Postal Laws and Regulations §§ 105-06, 443, 1626, 1408, 1426, 1430(21), 137, 235, 1866-70.

[18] In the absence of express legislation the government is not entitled to priority. See United States v. State Bank of North Carolina, 6 Pet. 29, 35; Mellon v. Michigan Trust Co., 271 U. S. 236, 239; United States v. Knott, 298 U. S. 544, 547.

The first statute permitting private suits on public contractors' bonds to the United States made no provision for government priority. 28 Stat. 278. By a later amendment private suits were forbidden until six months after completion of the contract and settlement of the contractors' accounts and the government was given priority. 33 Stat. 811; see Illinois Surety Co. v. Peeler, 240 U. S. 214, 217. The present statute requires two bonds, one for the government and a second for laborers and materialmen. 40 U. S. C. § 270a-d.

[19] Act of March 3, 1825, 4 Stat. 103.

[20] Cf. Wile v. United States Fidelity & Guaranty Co., 6 Alaska 48; Idaho Gold etc. Co. v. Croghan, 6 Idaho 471.

[21] National Surety Company v. United States, 129 Fed. 70 (C. C. A. 8); American Surety Company v. United States, 133 Fed. 1019 (C. C. A. 5); United States v. American Surety Company, 163 Fed. 228 (C. C. A. 4); United

There are over 44,000 post offices under the Post Office Department[22] and it is common knowledge that millions of items of mail go through them each year. It is rather obvious that numerous claims, many of them for small amounts, are likely to arise in the course of many transactions.[23] Under the Department's Regulations there is a fairly complete administrative formula for handling these claims from discovery to satisfaction.[24] These facts, along with the substantial interest of the government in the bonds, convince us that the Congress intended that claims on the bonds would be handled through the government rather than through various suits by individuals.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

States *v.* American Surety Company, 155 Fed. 941 (N. D. Ill.); Gibson *v.* United States, 208 Fed. 534 (C. C. A. 1); United States Fidelity & Guaranty Co. *v.* United States, 229 U. S. 397 (C. C. A. 8); United States Fidelity & Guaranty Company *v.* United States, 246 Fed. 433 (C. C. A. 9); United States *v.* United States Fidelity & Guaranty Company, 247 Fed. 16 (C. C. A. 6); United States *v.* Griswold, 8 Ariz. 453.

[22] Report of the Postmaster General, 1939, p. 126.

[23] Compare the Department's experience with claims on domestic insured mail during the fiscal year ending June 30, 1939. Payments were made in connection with 113,846 claims, and the average payment amounted to only $3.87. Report of the Postmaster General, 1939, p. 120.

[24] Postal Laws and Regulations § 816:

"The loss, rifling, damage, wrong delivery of, or depredation upon registered or other mail, and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.

"2. When the Chief Inspector finds that the facts ascertained in connection with such an investigation establish the responsibility, by reason of fault or negligence, of a postal employee or mail contractor or an agent or employee thereof, the Chief Inspector shall demand the amount of the loss from such employee or contractor.

. . . . . .

"6. If full recovery is not made and the Chief Inspector determines that further proceedings should be had, he shall present the facts to the Solicitor for the Post Office Department for advice as to the advisability of suit by the United States for recovery of the amount involved. Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.

"7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear."